

MILITARY LAW REVIEW VOL. 39

Articles

DE FACTO MILITARY STATUS: TYPES, ELEMENTS, AND BENEFITS

Major Boyd W. Allen, Jr.

MILITARY SEARCH AND SEIZURE—PROBABLE CAUSE REQUIREMENT

Major Robert D. Hamel

THE DOCTRINE OF WAIVER

Major Edwin P. Wasinger

CLAIMS OF SUBCONTRACTORS BEFORE THE ARMED SERVICES BOARD OF CONTRACT APPEALS

Major Leonard G. Crowley

HEADQUARTERS, DEPARTMENT OF THE ARMY

JANUARY 1968

PREFACE

The *Military Law Review* is designed to provide a medium for those interested in the field of military law to share the product of their experience and research with their fellow lawyers. Articles should be of direct concern and import in this area of scholarship, and preference will be given to those articles having lasting value as reference material for the military lawyer.

The *Military Law Review* does not purport to promulgate Department of the Army policy or to be in any sense directory. The opinions reflected in each article are those of the author and do not necessarily reflect the views of The Judge Advocate General or the Department of the Army.

Articles, comments, and notes should be submitted in duplicate, triple spaced, to the Editor, *Military Law Review*, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia **22901**. Footnotes should be triple spaced, set out on pages separate from the text and follow the manner of citation in the *Harvard Blue Book*.

This Review may be cited as **39 MIL. L. REV.** (number of page) **(1968)** (DA Pam **27-100-39**, 1 January **1968**).

For sale by the Superintendent of Documents, United States Government Printing Office, Washington, D.C. **20402**, Price: \$.75 (single copy). Subscription price : \$2.50 a year ; \$.75 additional for foreign mailing.

PAMPHLET

NO. 27-100-39

HEADQUARTERS
DEPARTMENT OF THE ARMY
WASHINGTON, D. C., 1 January 1968

MILITARY LAW REVIEW-VOL. 39

Page

Articles:

De Facto Military Status: Types, Elements, and Benefits Major Boyd W. Allen, Jr.	1
Military Search and Seizure—Probable Cause Requirement Major Robert D. Hamel	41
The Doctrine of Waiver Major Edwin P. Wasinger	85
Claims of Subcontractors Before the Armed Services Board of Contract Appeals Major Leonard G. Crowley	121

DE FACTO MILITARY STATUS: TYPES, ELEMENTS, AND BENEFITS*

By Major Boyd W. Allen, Jr.**

The purpose of this article is to present a study of de facto military status—officer and enlisted. Special emphasis is accorded to an analysis of the elements and benefits of such status and consideration is given to special problems such as de facto retired status. The author also examines the meaning and effect of Comptroller General decisions limiting de facto status because of “statutory prohibitions” and service “prohibited by law.”

I. INTRODUCTION

Many readers will probably react to the title of this article in one of two ways: “*De what???*” or “*So what!!!*” Certainly the topic is not one of the most widely discussed issues of the day, and at first glance its significance might seem remote.

Nonetheless, the subject is of vital importance to many officers and enlisted men who each year suddenly discover that they are not legally entitled to their commission or grade. Such a person’s chances to retain his pay and allowances, preserve his longevity and retirement credits, maintain his time in grade, and save other benefits incident to his service, may well depend upon whether or not he can qualify as a de facto officer or enlisted man. Moreover, the attorney who ventures into the tangled web of Comptroller General opinions, Court of Claims decisions, and opinions of The Judge Advocate General—the three major sources of the law on de facto status—is likely to discover that there are a great many uncertainties and apparent contradictions in this area of the law. For these reasons, the subject is greatly in need of examination.

The objectives of this article are: (a) to identify and analyze the elements of de facto officer status and de facto enlisted status;

* This article was adapted from a thesis presented to The Judge Advocate General’s School, U.S. Army, Charlottesville, Virginia, while the author was a member of the Fifteenth Advanced Course. The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General’s School or any other governmental agency.

** JAGC, U. S. Army; Judge Advocate, International Affairs Division, Office of The Judge Advocate General, Department of the Army, Washington, D. C.; **B.S., 1958, LL.B., 1959**, University of Illinois; admitted to practice before the bars of the ~~State~~ of Illinois, the United States Court of Military Appeals, and the United States Supreme Court.

39 MILITARY LAW REVIEW

(b) to discuss the benefits of de facto status; (c) to examine the extent to which de facto principles may be applied to retired members of the armed forces; and (d) to determine the meaning and effect of certain Comptroller General decisions limiting de facto status because of "statutory prohibitions" and service "prohibited by law."

During the course of this article, opinions of the Comptroller General concerning de facto status of civilian employees of the Federal Government will be considered from time to time. In general, these opinions will be mentioned only when they directly affect military personnel (*e.g.*, retired member of the armed forces employed by the Government in a civilian position), or when they state principles which the Comptroller General might apply to members of the military services in the future. References to such opinions are not intended to constitute a definitive coverage of de facto civilian employee status, since de facto civilian employee status as such is outside the scope of this article.

11. BACKGROUND

Before proceeding further, some basic definitions might be helpful: A de jure officer is a person who is regularly and lawfully elected or appointed to office and exercises the duties thereof as his right.¹ A de facto officer is "one whose title is not good in law, but who is in fact in the unobstructed possession of an office and discharging its duties in full view of the public, in such manner and under such circumstances as not to present the appearance of being an intruder or usurper." Put more succinctly, a de facto officer is one who is such in fact, but not in law.³

The above definitions,⁴ standing alone, contribute very little

¹ *People v. Staton*, 73 N.C. 546, 550 (1875).

² *Waite v. Santa Cruz*, 184 U.S. 302, 323 (1902).

³ *State v. Boykin*, 114 Miss. 527, 75 So. 378 (1917).

⁴ At this point, it should be noted that these definitions were developed by courts concerned with the status of civil officers rather than military officers. In most of these cases, the court was concerned with the rights of third parties who dealt with the de facto officer believing him to be a de jure officer, and was not concerned with the rights of the de facto officer to the benefits of the office. *State v. Carroll*, 38 Conn. 449 (1871), was such a case and still is cited today as a leading case with reference to de facto civil officers. On the other hand, the principles governing de facto status of military officers have evolved from a separate line of cases in which the issues involved the rights of the de facto officer rather than the rights of third parties. This article is concerned solely with this latter line of cases. Therefore, except for the general definitions which they provide, cases such as *Carroll* are outside the scope of this article. In this regard, the above-

DE FACTO MILITARY STATUS

to an understanding of de facto military status. However, they at least serve to illustrate the point that de facto principles become material only when some legal defect prevents de jure status. In the military services such a defect can arise in many ways, *e.g.*, invalid initial appointment, erroneous promotion, expiration of commission, retention beyond effective date of retirement, to name but a few. Indeed, the complexities of military personnel law provide such a fertile field for the development of impediments to de jure status, that one can scarcely contemplate all of the situations where de facto principles will become relevant. Of course, the mere absence of de jure status does not mean that the individual involved will automatically qualify as a de facto officer or enlisted man, as the case may be. As shall be seen in the next chapter, de facto status exists only when certain well established elements are present.

111. THE DE FACTO MILITARY OFFICER

A. ELEMENTS OF DE FACTO OFFICER STATUS

Any consideration of de facto officer status must begin with *United States v. Royer*,⁵ a 1925 Supreme Court decision consistently cited as the leading case on the matter. Royer was a first lieutenant in the U.S. Army Medical Corps serving with the American forces in France during World War I. In August 1918, General Pershing forwarded to Washington a recommendation that Lieutenant Royer be promoted to the grade of major. However, the Surgeon General recommended promotion only to captain, and the Secretary of War approved Royer's promotion to the latter grade. Through error, the Adjutant General cabled General Pershing that Royer had been promoted to major. The Surgeon General's office in France notified Royer of his "promotion" to the grade of major, whereupon he submitted a letter of acceptance and executed the oath of office on October 18, 1918. Thereafter, he performed duties as a major and received the pay and allowances of that grade. The error was not discovered until, in the ordinary course of events, Royer received a valid promotion

quoted definition of a de facto officer from *Waite v. Santa Cruz*, note 2 *supra*, a case involving the rights of third parties dealing with a de facto civil officer (mayor), was applied by the Supreme Court in *United States v. Royer*, 268 U.S. 394 (1925), the leading case concerning de facto status of military officers. Also, although these definitions technically apply only to officers, many of the principles of de facto officer status are applied "by analogy" to enlisted members. 39 COMP. GEN. 742 (1960).

⁵268 US . 394 (1925).

39 MILITARY LAW REVIEW

to major on February 17, 1919. On February 19, 1919, he was informed that the first appointment to major was a mistake. Nothing further was done until his discharge on August 31, 1919, when the Government deducted from his pay the difference between the pay of a captain and that of a major for the period October 18, 1918 (date of erroneous promotion to major) through February 16, 1919 (day prior to date of valid promotion to major). Royer then brought suit in the Court of Claims to recover the sum deducted from his pay. and was awarded judgment by that court.⁶ The Government appealed to the Supreme Court, which affirmed the decision of the Court of Claims, stating:

Here, respondent occupied the office and discharged its duties in good faith, and with every appearance of acting with authority; and, upon the facts heretofore recited, since he was not a mere intruder or usurper, he must be regarded as an officer *de facto*, within the spirit of the general current of authority..

Based upon the principles stated in the *Royer* case, administrative officials have consistently held that the following elements are necessary to establish *de facto* officer status:⁷ (1) the office actually exists; (2) the individual occupied the office under "color of authority"; (3) he acted in good faith; and (4) he performed the duties of the office.

Each of the above elements will now be considered individually, in an effort to gain a better understanding of their exact meaning.

1. *Office Actually Exists.*

It is well settled that "there can be no officer—either *de jure* or *de facto*—if there be no office to fill, the indispensable basis for a *de facto* officer being a *de jure* office."⁸ In the *Royer* case, the Government contended that Royer was not a *de facto* officer because there was no proof that there was a vacancy in the office of major. The Supreme Court replied :

Of course, there can be no incumbent *de facto* of an office if there is no

⁶ *Royer v. United States*, 59 Ct. Cl. 199 (1924).

⁷ 268 U.S. 394, 397 (1925). Since the Army had apparently conceded that Royer was at least entitled to the grade of captain during the period in question (18 October 1918—16 February 1919), the court was not called upon to decide whether Royer was a *de jure* captain during that time. This might have posed an interesting question, since it does not appear that Royer was ever actually tendered an appointment to captain, nor that he ever accepted such an appointment.

⁸ See JAGA 1966/4246, 30 Aug. 1966; JAGA 196015048, 7 Dec. 1960; 27 COMP. GEN. 730 (1948). See also Army Reg. No. 624-100, para 3d (29 Jul. 1966), which generally recognizes these principles.

⁹ 3 COMP. GEN. 647, 649 (1924).

DE FACTO MILITARY STATUS

officeto fill. . . . But the contention that there is no evidence of a vacancy in the office of major in the present case cannot be seriously considered. Everything was done upon the theory that there was such a vacancy; the Commanding General evidently determined that there was; and respondent entered upon and actually performed the duties of that office by direction of his superior officers. These facts are enough to establish the existence of the vacancy, for it is a well-settled rule that all necessary prerequisites to the validity of official acts are presumed to exist, in the absence of evidence to the contrary.”

The presumption of regularity relied upon by the court in the *Royer* case would seem to be adequate to establish the actual existence of the office in most cases involving a claim of de facto status by a military officer. Apparently, if there is sufficient evidence to establish the other three elements of de facto status (*i.e.*, color of authority, performance of duties, and good faith), a vacancy in the office will be presumed in the absence of evidence to the contrary. Such a rule is realistic because in most cases it would be extremely difficult, if not impossible, to relate a particular military officer’s status to a specific vacancy in the officer grade structure of a military service.¹¹

Of course, the presumption of regularity utilized by the Supreme Court in the *Royer* case would not apply in a case where there was evidence that the office did not exist. Such evidence will rarely be available in most cases involving an active duty military officer, but in a recent case¹² involving a civilian employee of the Government, the Comptroller General ruled that de facto status did not exist where the evidence showed the position in question was not authorized by proper authority.

¹⁰ 268 U.S. 394, 397-98 (1925).

¹¹ In any event, judicial and administrative decisions concerning de facto status of military officers rarely discuss the actual existence of the office in any detail, except to mention it as an element. On the other hand, such decisions usually contain extensive discussion of the other three elements of de facto status. The most notable exception to this general rule is found in cases concerning de facto status of retired officers, where the outcome of the case may depend on whether the individual “holds an office.” See, *e.g.*, 29 COMP. GEN. 520 (1950). The status of retired officers is treated in part V, *infra*.

¹² 45 COMP. GEN. 482 (1966). The case involved a post office clerk who was promoted to a higher grade as an assistant to the postmaster. Later, an audit revealed that the position of assistant to the postmaster had not been authorized by competent authority, and that the criteria for establishing the position had not been met. In holding that the clerk did not acquire the status of de facto assistant to the postmaster, the Comptroller General said: “While an employee under a color of authority may occupy an existing legal position and thus achieve a de facto status, there can be no *de facto* status if the position which he purportedly occupies does not legally exist.” *Id.* at 483.

39 MILITARY LAW REVIEW

2, *Color of Authority*.

An essential element of *de facto* status is that the incumbent occupied the office under “color of right” or “color of authority.”¹³ Defined in negative terms, “color of authority” means that the incumbent occupied the office under circumstances *not* presenting “the appearance of being an intruder or usurper.”¹⁴ Stating the matter in positive terms, the Comptroller General has said that “color of authority” contemplates that the incumbent served in the office pursuant to an appointment which he was justified in believing was competent to invest him with the office.¹⁵

In the *Royer* case, the Government argued that Royer was not a *de facto* major because there had been no attempt to appoint him to that grade by an officer possessing the power to do so. The Supreme Court replied that :

[T]he rule is well established that to constitute an officer *de facto* it is not a necessary prerequisite that there shall have been an attempted exercise of competent or *prima facie* power of appointment. . . . Here, respondent occupied the office . . . *with every appearance of acting with authority*; and, upon the facts heretofore recited, *since he was not a mere intruder or usurper*, he must be regarded as an officer *de facto*. . . .¹⁶

In other words, “color of authority” does not require that there shall have been an attempted exercise of *actual* authority to confer the office upon the incumbent, but it does require the existence of apparent authority which at least shows that he was not an intruder or usurper. For example, in the *Royer* case neither the Adjutant General or General Pershing had *actual* authority to promote Royer to the grade of major, but in the words of the Supreme Court :

The Adjutant General, from the nature of his office, is the appropriate channel through which information in respect of appointments and promotions is transmitted. . . . That officer having informed General Pershing that the appointment of respondent as major had been made, General Pershing was warranted in giving notice to respondent that he had been so appointed, and respondent was justified in accepting and acting upon it.”

¹³ See JAGA 1966/4246, 30 Aug. 1966; 34 COMP. GEN. 266 (1954) ; 27 COMP. GEN. 730 (1948). The terms “color of right” and “color of authority” are used interchangeably. To avoid confusion, only the term “color of authority” will be utilized in this article.

¹⁴ *Waite v. Santa Cruz*, 184 U.S. 302, 323 (1902). This has since been interpreted to mean the incumbent “must not be a mere usurper or volunteer.” See U.S. DEP’T OF ARMY, PAMPHLET NO. 27-187, MILITARY AFFAIRS para 7.3b (1966).

¹⁵ See 34 COMP. GEN. 132 (1954).

¹⁶ 268 U.S. 394, 397 (1925) (emphasis added).

¹⁷ *Id.* at 396.

DE FACTO MILITARY STATUS

Thus, the acts of the Adjutant General and General Pershing in notifying Royer of his promotion constituted apparent authority or "color of authority" so far as Royer was concerned, which "justified" him in accepting the appointment and acting upon it.

A good example of the application of these principles of the Royer case is found in an opinion of the Comptroller General.¹⁸ A naval officer stationed overseas was promoted from lieutenant commander to commander based on a promotion list which had his name on it, but no service number or 'other identification. Promotion was effected only after the Commander, Naval Forces, Europe, had advised the Bureau of Naval Personnel of the officer's service number, and had requested and received from the Bureau written authorization to promote him based on the list. Over eighteen months after the promotion, the Bureau advised the officer that he was not the officer named on the promotion list, that it was another officer with the same name.

In ruling that the officer had served as a *de facto* commander from the time of his "promotion" to the date he was notified of its invalidity, the Comptroller General noted that during this time he served as a commander under the color of a valid appointment, without either actual or constructive knowledge of the defect in the appointment.

Thus, "color of authority" was found in the appearance of authority created by the promotion list and the authoritative position of the Bureau of Naval Personnel, which like the Adjutant General in the *Royer* case, has administrative responsibilities with respect to promotions, and is the channel through which information concerning them is transmitted.

However, "color of authority" is not always dependent on the mere "appearance" of authority. As previously noted, the Supreme Court in the Royer case rejected the Government's contention that *de facto* status requires an attempt to appoint the incumbent to the office by an officer possessing the power to do so (*i.e.*, attempted exercise of actual authority).¹⁹ But this is not to say that *de facto* status cannot result from an attempted exercise of actual authority. Quite to the contrary, *de facto* status most frequently arises from an attempted appointment by competent authority which for some reason is void. For example, *de facto* status may arise where an otherwise valid appointment is rendered void by a lack of eligibility in the appointee, unknown to or overlooked by authorities at the time of the attempted appoint-

¹⁸ 27 COMP. GEN. 730 (1948).

¹⁹ See text accompanying note 16 *supra*.

39 MILITARY LAW REVIEW

ment.²⁰ In most of these cases, the prima facie valid appointment will probably satisfy the requirements of “color of authority”;²¹ however, if the appointee is aware of his ineligibility, de facto status will be precluded for lack of good faith.

3. Good Faith.

To acquire de facto status an officer must have acted in good faith in accepting the office and acting pursuant to it.²¹ This means that he must have had neither actual nor constructive knowledge of the defect in his entitlement to the office.²² Furthermore, de facto status, once established, is terminated whenever the individual learns of the irregularity in his appointment.²³

The meaning and effect of the good faith requirement is illustrated by a line of Comptroller General decisions concerning reserve officers. These officers accepted Regular Army appointments and subsequently served on active duty in a higher grade than legally entitled to. In one case,²⁴ a reserve captain accepted an appointment as a Regular Army second lieutenant. The orders announcing his appointment in the Regular Army contained the customary notice in abbreviated form that acceptance of the appointment would automatically terminate any prior appointment in another component. Thereafter, the officer received orders to active duty and other correspondence addressed to him in the grade of captain. As a result, he entered active duty as a captain and served for four years in that grade before the error was discovered. The Comptroller General ruled that the *terms of the order announcing his Regular Army appointment constituted notice to the officer that his reserve captaincy was terminated*, and that, under such circumstances, the orders to active duty and other correspondence addressed in the higher grade notwithstanding, there was neither “color of authority” nor good faith

²⁰ See JAGA 1965/5222, 17 Jan. 1966 (appointee not eligible for commission because at time of appointment he was not a citizen of the United States and had not filed a declaration of intent to become a citizen); JAGA 1965/3553, 9 Mar. 1965 (officer not eligible for promotion to colonel because he had not completed Command and General Staff School); JAGA 1965/3369, 11 Feb. 1965 (appointee not eligible for ARNGUS commission because he had previously been discharged from Army Reserve for twice failing selection for promotion). De facto status was found to exist in all of these cases.

²¹ See *United States v. Royer*, 268 U.S. 394 (1925); 34 COMP. GEN. 263 (1954); JAGA 1966/4246, 30 Aug. 1966.

²² See 27 COMP. GEN. 730 (1948).

²³ See *Heins v. United States*, 137 Ct. Cl. 658 (1957); JAGA 1960/5048, 7 Dec. 1960.

²⁴ 34 COMP. GEN. 132 (1954).

DE FACTO MILITARY STATUS

to support de facto status. Accordingly, he was required to pay back four years excess pay and allowances.

In a similar case,²⁵ a reserve lieutenant colonel accepted an appointment as a Regular Army captain, which contained the same notice concerning termination of other appointments. He then received orders to active duty as a lieutenant colonel. Upon entering active duty he also received an appointment as a major, AUS. He served as a lieutenant colonel for eight months before the error was discovered. The Comptroller General held that *the notice in the Regular Army appointment should have at least 'caused him in good faith to make inquiry concerning the matter, and that:*

[A] mere administrative error in referring to an officer's rank does not change his status in that respect or afford a basis for him to assume that he has been appointed or promoted to a higher rank.

The matter has been carefully considered but this Office may not conclude that the present record sufficiently establishes that in collecting the pay and allowances of a lieutenant colonel you acted in such good faith as to permit you to retain the overpayment, within the principles of the cited *Royer* case and decisions of this Office."

In yet another similar case," a contrary result was reached. After accepting an appointment as a Regular Army first lieutenant, the officer received what purported to be a commission in the AUS as a captain. Actually, the commission was supposed to be a reserve appointment, which in itself was issued in error and would have been ineffective, but the only indication on its face that it was supposed to be a reserve appointment was a reference in the commission to a statute governing reserve commissions. Thereafter, the officer received orders to active duty as a captain, and he subsequently served in that grade for over three years. The Comptroller General ruled that under such circumstances it was not unreasonable for the officer to believe that he held a valid appointment as a captain, AUS. Since he performed duties as a captain under "color of authority" and in good faith, he was a de facto captain until such time as the error was discovered and brought to his attention.

Based on the above decisions, The Judge Advocate General of the Army has concluded:

Where such an officer received not only orders to AD addressed to him in the higher grade, but an instrument of *appointment* to that grade in

²⁵ 34 COMP. GEN. 263 (1954).

²⁶ *Id.* at 266.

²⁷ 34 COMP. GEN. 266 (1954).

39 MILITARY LAW REVIEW

the AUS, . . . [the] Comp. Gen. concluded that he *acted in good faith under color of authority*. . . . But where the officers concerned relied solely on orders to AD addressed to them in the higher grades, Comp. Gen. has held that *they were required in good faith to make inquiry* as to the effect of such orders and that creation of *de facto* status was precluded by their failure to do so. . . .²⁸

Applying the above principles, The Judge Advocate General concluded that an ex-officer who had been discharged after failing the Artillery Officer's Basic Course, did not act under "color of authority" or in good faith when he thereafter complied with a port call to Korea and subsequently served in that country for some six months in his former grade of 2d lieutenant."

4. *Color of Authority and Good Faith Compared.*

By this time it should be apparent that "color of authority" and good faith are very closely related. For one thing, the close relationship between the two elements of *de facto* status is apparent from the definitions of "color of authority" quoted previously (*i.e.*, "color of authority" means that the incumbent occupied the office under circumstances *not* presenting the appearance of being an intruder or usurper,³⁰ and "color of authority" contemplates that the incumbent served in the office pursuant to an appointment which he was *justified* in believing was competent to invest him with the office).? Whether the incumbent was justified in believing in the validity of his appointment is clearly relevant to the question of his good faith, and it is obvious that an intruder or usurper could not have the good faith required to establish *de facto* status.

What then is the difference between "color of authority" and good faith? It is submitted that "color of authority" is an *ob-*

²⁸ JAGA 1962/3886, 4 May 1962 (emphasis added).

²⁹ See *id.* See also JAGA 1965/4652, 7 Sep. 1965, where The Judge Advocate General ruled no *de facto* status in the case of an ex-officer erroneously ordered to active duty by Headquarters, 5th U.S. Army, several years after he had been discharged for failing the Basic Infantry Officer's Course. A key factor in the case was the ex-officer's failure to make inquiry when notified of his impending call to active duty. Instead, he filled out a form indicating the date he was tendered his commission, and stating that he had not previously been granted a delay in reporting for active duty. Moreover, he asked for and received a three-month delay. Thereafter, he reported and served on active duty for over a month before the error was discovered. However, the mere fact of prior discharge will not necessarily preclude a finding of good faith. In this respect, see 32 COMP. GEN. 397 (1953), where *de facto* status **was** found in the case of a former enlisted reservist erroneously ordered to active duty during the Korean conflict after he had already been discharged from the Reserve.

³⁰ See note 14 *supra* and accompanying text.

³¹ See 34 COMP. GEN. 132 (1954).

DE FACTO MILITARY STATUS

jective test of the sufficiency of the *authority* present in a given case to determine whether the authority in and of itself justified reliance thereon. On the other hand, good faith is a *subjective* test of the *knowledge* of the incumbent to determine whether he had either actual or constructive notice of the defect in his office.

To the extent that the indicia of authority relied upon in a given case constitutes at least part of the total knowledge of the incumbent, “color of authority” and good faith clearly overlap. Theoretically at least, a case could arise where the available evidence of authority (*e.g.*, a *prima facie* valid promotion to colonel) *in and of itself* would justify reliance thereon ; but at the same time the incumbent in fact knows he is ineligible for the appointment (*e.g.*, he knows that regulations require completion of Command and General Staff School prior to promotion to colonel). In such a case *de facto* status would be defeated by the incumbent’s lack of good faith, as evidenced by his independent knowledge of the invalidity of his appointment. At the same time, one could envision a situation where the authority relied upon is clearly inadequate (*e.g.*, oral advice from a non-authoritative source), and yet, because of the incumbent’s naivety or lack of intelligence, he nonetheless relies upon the clearly inadequate authority to assume the office. In such a case, *subjectively* the incumbent acted in good faith. Nonetheless, *objectively* there was no “color of authority” and *de facto* status is precluded.

Unfortunately, judicial and administrative decisions concerning *de facto* status do not provide such a clear-cut distinction between “color of authority” and good faith. In the typical case both elements are so inextricably bound together in the same set of facts that it is difficult, if not impossible, to speak about one element without mentioning the other. This situation gives rise to pronouncements such as: “Reliance on questionable or confusing authority is not sufficient to constitute ‘color of authority’ or good faith. . . .”³² As a result of this situation, in many cases no real distinction is made between “color of authority” and good faith.

A recent opinion of The Judge Advocate General³³ provides a

³²JAGA 1966/4246, 30 Aug. 1966; see JAGA 1960/4313, 19 Jul. 1960. The overlap between “color of authority” and good faith is illustrated in those Comptroller General decisions discussed previously (see text accompanying notes 24–29 *supra*) concerning former reserve officers who accepted Regular Army appointments in lower grades and then erroneously served on active duty in their former higher reserve grades. In deciding those cases, the Comptroller General looked to the same facts and circumstances in each case to resolve both “color of authority” and good faith.

³³JAGA 1966/4246, 30 Aug. 1966.

39 MILITARY LAW REVIEW

good example of how easily the distinction between “color of authority” and good faith can be overlooked. In that case a dental reserve officer received orders directing him to report for active duty at Walter Reed Hospital on June 30, 1965. For his own convenience the officer reported for duty over two weeks early (June 14, 1965), and with the permission of the hospital adjutant signed in and assumed duties appropriate to his grade and training. Thereafter, efforts of hospital authorities to get the officer’s orders amended proved unsuccessful and the matter was referred to The Judge Advocate General. After ruling that the orders could not be retroactively amended to show a reporting date of June 14, 1965, The Judge Advocate General concluded that the file contained insufficient evidence to determine whether the officer was justified in believing that he was authorized to enter active duty early and whether he performed his duties in good faith during the entire period in question. Accordingly, the file was returned for further investigation.

However, before returning the file The Judge Advocate General indicated that if the officer was aware that the hospital adjutant did not have authority to advance his reporting date, or even if the officer had notice that the adjutant’s authority was questionable, it would not seem that he was justified in believing that he was serving pursuant to competent orders. Moreover, if the officer knew of the attempt to have his orders amended, this (‘would appear to militate against a finding of good faith.’ In this regard, “[r]eliance on questionable or confusing authority is not sufficient to constitute ‘color of authority’ or good faith, and an officer who has notice of an irregularity cannot claim *de facto* status after the date on which he has such notice” [citations omitted].³⁴

Thus, conversely, if the officer was *not* aware of the adjutant’s lack of authority, and if he did *not* have notice that the adjutant’s authority was questionable, and if he did *not* know of the attempt to have his orders amended, apparently The Judge Advocate General would be satisfied that he acted in good faith under “color of authority,” and that he qualified as a *de facto* officer.

The most striking thing about this line of reasoning is its *subjective* approach to both good faith and “color of authority.” In other words, if the officer *actually* believed in the authority of the adjutant, he not only acted in good faith but under “color of authority” as well. Such an approach seems contrary to the more

³⁴ *Id.*

DE FACTO MILITARY STATUS

objective test customarily utilized in resolving the question of “color of authority.” Viewed objectively, oral advice from a hospital adjutant would not appear to be authority which a person would be justified in believing was competent to invest him with office.³⁵

Of course the Comptroller General has not said that “color of authority” is an objective test, nor has he said that good faith is a subjective test. This is a conclusion of the author of this article. However, unless the distinction is made, there would not appear to be any difference between “color of authority” and good faith.

5. *Performance of Duties.*

Assuming that the incumbent occupies an existing office under “color of authority” in good faith, he will not achieve de facto status until he commences performance of the duties of the office, nor will de facto status continue after he has ceased to perform those duties. In other words, performance of duties is an essential element of de facto status.³⁶

In many respects performance of duties is the very essence of de facto status. In the words of the Comptroller General.

[I]t is well to remember that such rule [de facto doctrine] was introduced into the law, not as a pay rule, but as a matter of policy and necessity, to protect the interests of the public and individuals whose interests were involved in the official *acts of persons exercising the duties of an office* without being lawful officers. . . . As that rule developed, it was concluded that such *de facto* officers could retain the salaries paid them for *duties performed in such status* but there appears to be no sound reason why the rule should be extended further to cover persons who . . . have no official duties to perform from day to day.”

Thus, from its inception the de facto doctrine has been concerned with the *acts* of persons occupying an office though not legally entitled to it, either from the point of view of third parties who have relied on such *acts*, or from the point of view of the would-be officers seeking compensation for the performance of those *acts* or duties. Indeed, the very term de facto or “in fact” implies action. Unless the incumbent *acts* as an officer, he has nothing upon which to base a claim to the office and its emoluments except his bare “appointment” which is void.

“Also of interest in this case is the fact that the officer reported early for his own convenience and requested permission to enter active duty early. Does this make him a “volunteer” and therefore excluded by definition from the scope of “color of authority?” See note 14 *supra* and accompanying text.

³⁵ See *Palen v. United States*, 19 Ct. Cl. 389 (1884); 36 COMP. GEN. 632 (1957); JAGA 1966/4246, 30 Aug. 1966.

³⁷ 36 COMP. GEN. 632, 634 (1957) (emphasis added).

39 MILITARY LAW REVIEW

A good example of how performance of duties limits the inception and duration of de facto status is found in *Bennett v. United States*,³⁸ an 1884 Court of Claims decision cited by the Supreme Court in the *Rover* case. Bennett was commissioned as a second lieutenant on April 1, 1863, and was promoted to first lieutenant on January 6, 1864. His resignation was accepted by the President on October 18, 1866, and he performed no further duties until December 4, 1866, when the President revoked his acceptance of Bennett's resignation and ordered him back to active duty. On December 12, 1866, the President nominated Bennett for restoration to first lieutenant with his former date of rank. On February 23, 1867, the Senate gave its advice and consent to Bennett's re-appointment. Upon entering active duty on December 4, 1866, Bennett was paid the pay and allowance of a first lieutenant from the date the President had accepted his resignation, October 18, 1866, and thereafter.

The court held that the President's acceptance of Bennett's resignation on October 18, 1866, had effectively removed him from the military service, and only a new appointment could restore him to office. This was accomplished on February 23, 1867, when the Senate gave its advice and consent to Bennett's re-appointment. Thus, on February 23, 1867, Bennett became a de jure first lieutenant. However, he had been paid since October 18, 1866. The court held that he was a de facto officer during the period December 4, 1866, to February 23, 1867, since he had performed the duties of a first lieutenant during this time. Accordingly, he was allowed to retain pay and allowances received for duties performed from December 4, 1866, to February 23, 1867. However, since he performed no duties from October 18, 1866, to December 4, 1866, he was neither an officer de facto or de jure during that time, and was not allowed to retain pay and allowances received for that period.

The absence of performance of duties may preclude de facto status in other situations. Thus, if a void appointment as a reserve officer is made on June 3, 1964, and the "officer" does not enter active duty until August 8, 1964, de facto status does not exist until the latter date, even though the other three elements of de facto status are present at the time of the "appointment" on June 3.³⁹

What kind of duties must be performed to achieve de facto

³⁸ 19 Ct. Cl. 379 (1884).

³⁹ See JAGA 1965/3780, 12 Apr. 1965 (*us modified by* JAGA 1965/4092, 17 May 1965).

DE FACTO MILITARY STATUS

status? Obviously, what is usually contemplated is performance of the normal duties of the officer on active duty. However, The Judge Advocate General has expressed the opinion that the performance of duties while on inactive duty training or active duty for training may give rise to de facto status.⁴⁰ Moreover, in some circumstances, the "duties" of a retired member are sufficient to establish de facto status.⁴¹

B. BENEFITS OF DE FACTO OFFICER STATUS

Having discussed the requirements that must be met to qualify as a de facto officer, the next question is: What are the rights of a de facto officer? That is: What right does a de facto officer have to the benefits which attach to de jure officer status? The remainder of this chapter shall be concerned with the rights of a de facto officer—to (1) pay and allowances, (2) credit for service in the computation of pay (longevity), (3) retirement, and (4) promotion.

1. Pay and Allowances.

It is well settled that a person may retain pay and allowances which he has received for services performed while in a de facto status.⁴² Moreover, if the Government has required a person to refund pay and allowances which he had received for de facto service, he is entitled to recover them.⁴³ This appears to be an equitable right based on unjust enrichment, for in the words of the Supreme Court:

[T]he money having been paid for services actually rendered in an office held de facto, and the government presumably having benefited to the extent of the payment, in equity and good conscience he should not be required to refund it.⁴⁴

However, a de facto officer may not retain the pay and allowances received by him during his de facto service which represents compensation for a period of time when he was neither an officer de facto or de jure.⁴⁵ Thus, as was seen in the *Bennett* case,⁴⁶ if an incumbent receives pay and allowances for a period

⁴⁰ See JAGA 1965/3369, 11 Feb. 1965.

⁴¹ See 44 COMP. GEN. 258 (1964). The rules concerning de facto status of retired members are discussed in part V *infra*.

⁴² See *United States v. Royer*, 268 U.S. 394 (1925); 27 COMP. GEN. 730 (1948); JAGA 1965/3553, 9 Mar. 1965.

⁴³ See *United States v. Royer*, 268 U.S. 394 (1925); 30 COMP. GEN. 195 (1950).

⁴⁴ *United States v. Royer*, 268 U.S. 394, 398 (1925).

⁴⁵ See *Bennett v. United States*, 19 Ct. Cl. 379 (1884).

⁴⁶ *Id.*

39 MILITARY LAW REVIEW

of time prior to the date he began discharging the duties of the office, he must refund them.

And, of course, a *de facto* officer can have no greater right to pay and allowances than he would have as a *de jure* officer. A good illustration of this point is found in the Comptroller General decision discussed previously, concerning the naval officer who was mistakenly “promoted” to commander.⁴⁷ In that case, the officer was “promoted” on November 29, 1945, to be effective November 1, 1945. A statute in effect at the time provided that promotions were effective from the date made by the President (in this case November 29). Since even a *de jure* promotion could not be effective prior to the date made by the President, a *de facto* officer could acquire no greater rights. Accordingly, the officer was allowed to retain the pay and allowances of a commander received after November 29, 1945, in a *de facto* status, but was required to refund the difference between the pay of a commander and lieutenant commander for the period November 1—November 29, 1945.

Another limitation on the right of a *de facto* officer to retain pay and allowances received by him is that he may not retain pay and allowances received *after* termination of his *de facto* status,⁴⁸ even if such pay and allowances are for services rendered while still in a *de facto* status. For example, if a *de facto* officer is notified on the 29th of the month that his appointment is defective, thereby terminating his *de facto* status,⁴⁹ he may not retain that month’s pay received the next day, even though he was in a *de facto* status for the first 28 days of the month.

This latter limitation is an outgrowth of the greatest single restriction on the right of a *de facto* officer to pay and allowances: A *de facto* officer is not entitled to accrued pay and allowances which he has not yet collected on the date his *de facto* status terminates.⁵⁰ In the words of the Court of Claims:

The judicial decisions are uniform that one claiming a salary must prove his legal title to the office, and that an officer *de facto* and not *de jure* can not maintain an action for salary.”

On another occasion the Court of Claims has said:

⁴⁷ 27 COMP. GEN. 730 (1948). For a summary of this case see text accompanying note 18 *supra*.

⁴⁸ See JAGA 196515222, 17 Jan. 1966.

⁴⁹ See 27 COMP. GEN. 730 (1948). Receipt of actual or constructive notice of defect in appointment terminates good faith, and *de facto* status cannot exist without good faith. For a discussion of good faith, see part 111. A.3. *supra*.

⁵⁰ See 44 COMP. GEN. 258 (1964); JAGA 1966/4246, 30 Aug. 1966.

⁵¹ *Romero v. United States*, 24 Ct. Cl. 331, 335 (1889).

DE FACTO MILITARY STATUS

Whatever exception there may be as to the right of a *de facto* officer to retain money received . . . we are clear that the present case falls within the well-known general rule that no recovery can be had for the discharge of the duties of an office by a *de facto* officer!

Based upon the above principles, the Comptroller General has consistently denied claims for accrued pay and allowances based on *de facto* service. That officer's position on the matter may be stated very briefly: "[T]he nonpayment or short payment of salary to a *de facto* officer or employee can not form the basis of a legal claim against the United States."⁵³

However, in *Heins v. United States*⁵⁴ the Court of Claims chose not to follow the rule precluding recovery of accrued pay by a *de facto* officer. Heins was an Air Force lieutenant who had orders to report for active duty on December 6, 1951. However, he was unable to comply with his orders due to illness which required hospitalization. Nonetheless, Air Force military police had Heins "returned to military control" after his release from the hospital. He subsequently received pay and allowances from December 6, 1951, through March 31, 1952. On April 16, 1952, The Judge Advocate General of the Air Force rendered an opinion that Heins was not legally on active duty. Heins was advised of the opinion on April 23, 1952. The local finance officer immediately stopped his pay and he never received any pay for April 1952. Heins then brought suit in the Court of Claims, which held:

Therefore, we find that plaintiff in good faith followed the directions given him by the Air Force, and while not paid as an active-duty officer [*de jure*] . . . was paid as a *de facto* active duty officer and is entitled to retain what was paid him.

It would seem to be completely illogical to say that plaintiff was entitled to the money already paid him as a *de facto* active duty officer and then to say he is not entitled to the remainder because he was not entitled to active-duty pay. Hence we conclude plaintiff is not only entitled to retain the money paid him, but is entitled to be paid during the period. . . for which he was not paid; i.e., April 1, 1952 to April 23, 1952, when he was notified by the Air Force that he was not on active duty.⁵⁵

In awarding Heins pay and allowances which had accrued to him but which he had not received prior to the termination of his *de facto* status on April 23, 1952, the court clearly acted contrary to well established authority. The court cited no author-

⁵² *Pack v. United States*, 41 Ct. Cl. 414, 429-30 (1906).

⁵³ 6 COMP. GEN. 263, 265 (1926).

⁵⁴ 137 Ct. Cl. 658 (1957).

⁵⁵ *Id.* at 665 (emphasis added).

39 MILITARY LAW REVIEW

ity in support of its holding, other than logic; nor did it attempt to distinguish the case or to overrule previous decisions to the contrary. Indeed, the court did not even mention the long line of its own decisions to the contrary.⁵⁶ No one can deny that the decision is logical and just; however, it does not appear that the case has been followed by administrative authorities in subsequent cases, although it has been cited for other propositions not germane to this issue.⁵⁷ Perhaps it is merely an ad hoc decision which has no value as a precedent. On the other hand, there is no reason to assume the Court of Claims would not follow the decision if confronted with a similar claim. Be that as it may, based on the great weight of authority, one could summarize the rules concerning the rights of a de facto officer to pay and allowances in the following manner.

A de facto officer has no *legal* right to compensation for his services. He has an *equitable* right to retain pay received while in a de facto status, but until he actually receives the compensation he has no right whatever to it. This means he may not recover accrued pay which he had not yet collected when his de facto status terminated. Moreover, once his de facto status is terminated, he may not retain compensation received thereafter. However, he may recover compensation which he had received during his de facto service and which the Government required him to refund.

2. *Longevity.*

As a general rule, service performed while in a de facto status is creditable in computing years of service for longevity pay purposes.⁵⁸ This right was recognized by the Court of Claims as long ago as 1884, when that court held :

In our opinion the word "service" as used in these acts means actual service performed under color of office or other authority, without regard to any defects which might be found in the legal title of the claimant to the office or position in which he served.

. . . In that view it matters not whether the officer serves as such *de jure* or *de facto*.⁵⁹

⁵⁶ See, e.g., *Northup v. United States*, 45 Ct. Cl. 50 (1909); *Pack v. United States*, 41 Ct. Cl. 414 (1906); *Romero v. United States*, 24 Ct. Cl. 331 (1889).

⁵⁷ E.g., the *Heins* case was cited in 44 COMP. GEN. 83 (1964) for the proposition that a de facto officer is not "entitled to receive basic pay" and is therefore not eligible for disability retirement. For a discussion of that decision, see note 74 *infra* and accompanying text. So far as the author of this article has been able to determine, neither the Comptroller General nor The Judge Advocate General have ever referred to the fact that the Court of Claims allowed Heins to recover accrued pay.

⁵⁸ See 44 COMP. GEN. 277 (1964); 32 COMP. GEN. 397 (1953).

⁵⁹ *Bennett v. United States*, 19 Ct. Cl. 379, 387 (1884).

DE FACTO MILITARY STATUS

However, the Comptroller General has imposed a substantial limitation on the creditability of *de facto* service for longevity pay purposes: If such service was in effect “prohibited by law,” the *de facto* officer may retain compensation he has already received, but the *de facto* service is not creditable for longevity pay or other purposes.⁶⁰ In the words of the Comptroller General:

Irrespective of whether [he] may be viewed as having served in a *de facto* status, it may not be concluded that the Congress intended to authorize credit and increased pay for service prohibited by law. That is, the law may not be applied as intending to reward that which the law prohibits.”

When is service “prohibited by law?” Certainly, “prohibited by law” must contemplate something more than “contrary to law” or “not in accordance with law,” because *de facto* status does not come into existence unless there is something “contrary to law”) or “not in accordance with law” which prevents legal or *de jure* status. Thus, if “prohibited by law” meant merely “contrary to law,” the exception would swallow the general rule and *de facto* service could never be credited for longevity or other purposes.

Although the Comptroller General has not defined “prohibited by law” in so many words, his decisions on the matter seem to follow a consistent pattern: *De facto* service will be deemed “prohibited by law” only if the defect or impediment which prevents *de jure* status goes to the eligibility of the incumbent for the office or position. Thus, in the absence of a previously obtained waiver, active Reserve service performed while over-age in grade is contrary to statute⁶² and implementing regulations,⁶³ and is in effect “prohibited by law.”⁶⁴ Similarly, where it is provided by statute⁶⁵ that the Naval Reserve shall be composed of “male citizens of the United States,” membership of an alien in the Marine Corps Reserve is in effect “prohibited by law,” and an alien, although a *de facto* member, may not receive credit for his active duty Reserve service in the computation of his longevity pay.⁶⁶ On the other hand, where an officer’s 5-year appointment as a captain in the Air Force Reserve expired on April 1, 1953, but he continued to serve on active duty until September 20, 1953,

⁶⁰ See 44 COMP. GEN. 284 (1964); 32 COMP. GEN. 397 (1953).

⁶¹ 32 COMP. GEN. 397, 398 (1953).

⁶² 10 U.S.C. § 1003 (1964).

⁶³ Air Force Reg. No. 45-5, para 12b(4) (21 Apr. 1955).

⁶⁴ See 44 COMP. GEN. 284 (1964).

⁶⁵ Naval Reserve Act of 1938, ch. 690, § 4, 52 Stat. 1176.

⁶⁶ See 32 COMP. GEN. 397 (1953).

39 MILITARY LAW REVIEW

his service from April 2, 1953, through September 20, 1953, was in a de facto status and was *not* "prohibited by law." Accordingly, such service is creditable in the computation of longevity pay.⁶⁷

In both of the above cases where the service was found to be "prohibited by law," the defect which prevented de jure status was of such a nature as to render the incumbent *ineligible* for his office or position, *i.e.*, being over-age rendered the officer ineligible for active Reserve service, and not being a citizen of the United States rendered the alien ineligible for membership in the Marine Corps Reserve. But where the defect preventing de jure status did not render the incumbent ineligible for his office, the service was not deemed to be "prohibited by law," *i.e.*, expiration of commission does not affect the incumbent's eligibility for a commission.

Assuming then that "prohibited by law" refers to defects which render the incumbent ineligible for the office or position, most situations giving rise to de facto status can be quickly analyzed to determine whether service under such circumstances is "prohibited by law." For example, where de jure status is precluded because the incumbent is under-age or over-age, or because he has not completed a course of instruction at a service school which is required for promotion to the grade in which he is serving, or because he has previously been discharged from a commissioned status for twice failing selection for promotion, he may achieve de facto status;⁶⁸ however, since he is ineligible for the office in which serving, his service is "prohibited by law" and is not creditable for longevity pay purposes. On the other hand, where the defect preventing de jure status is in the nature of a mistake of fact or procedure which does not render the incumbent ineligible for the office, such as the mistake in grade to which promoted involved in the *Royer* case,⁶⁹ or the mistake in identity involved in the Comptroller General decision concerning the naval officer erroneously "promoted" to commander,⁷⁰ the service is *not* "prohibited by law" and is creditable for longevity pay purposes.

Of course, even where service in a de facto status is "prohibited by law" and is therefore not creditable for longevity purposes, the incumbent may have creditable service based on a separate de

⁶⁷ See 44 COMP. GEN. 277 (1964).

⁶⁸ See note 20 *supra* and accompanying text.

⁶⁹ See text accompanying notes 5-7 *supra*.

⁷⁰ See 27 COMP. GEN. 730 (1948). See text accompanying note 18 *supra*.

DE FACTO MILITARY STATUS

jure status held by him at the same time, such as where an officer receives a void promotion but continues to hold his lower grade.

3. Retirement.

Unless “prohibited by law,” de facto service is creditable in computing total years of service for retirement for length of service purposes.⁷¹ “Prohibited by law” has the same meaning here as in the case of longevity pay, *i.e.*, the defect precluding de jure status and giving rise to de facto status is of such a nature as to render the de facto officer ineligible for de jure status. For example, referring to cases discussed previously in connection with longevity pay, service while over-age in grade is in effect “prohibited by law” and is not creditable for retirement purposes.⁷² On the other hand, service after expiration of commission is not “prohibited by law” and is creditable for retirement purposes.⁷³

A separate problem is whether a de facto officer is eligible for retirement while he is serving only in his de facto status. This problem was raised in a recent Comptroller General decision.⁷⁴ It involved a de facto officer who was placed on the temporary disability retired list at a time when he held no de jure status in any grade. Subsequently, the “officer” was placed on the permanent disability retired list, and ten years passed before authorities discovered that at the time he was placed on the temporary retired list he held no commission or other de jure status in the Army. The statute governing retirement for disability authorizes retirement only while entitled to receive basic pay.⁷⁵ The Comptroller General ruled that since a de facto officer is not “entitled” to receive basic pay,⁷⁶ there was no legal basis for retiring him. Accordingly, in the absence of action by the Army Board for Correction of Military Records, he was not entitled to retain the retired pay received during his ten years on the disability retired list.

The rule of the above case may be stated very simply: A de

⁷¹ See 44 COMP. GEN. 277 (1964). This means that de facto service is creditable in computing years of service to determine eligibility for retirement, and in computing the amount of retired pay, to the same extent as de jure service is creditable.

⁷² See 44 COMP. GEN. 284 (1964).

⁷³ See 44 COMP. GEN. 277 (1964).

⁷⁴ 44 COMP. GEN. 83 (1964).

⁷⁵ 10 U.S.C. § 1202 (1964).

⁷⁶ Although a de facto officer is allowed to retain pay and allowances he has received, he has no legal right to compensation for his services. See part III. B.1. *supra*.

facto officer is not eligible for disability retirement. In this regard, whether or not the de facto service is "prohibited by law" is immaterial. No de facto officer is eligible because de facto officers are not "entitled" to basic pay. Moreover, the Comptroller General has ruled in an earlier case that if the de facto officer also holds a lower de jure grade at the time of retirement for disability, he is entitled to retirement only in the lower de jure grade.⁷⁷

In view of the above decisions, is a de facto officer eligible for retirement for length of service? Lest there be confusion on this point, it must be understood that the fact that de facto service may be creditable in computing total years of service for retirement purposes has no bearing here. The Comptroller General decisions holding that de facto service may be creditable for such purposes did not involve officers who were still in a de facto status at the time of retirement. What is in question here is whether a de facto officer still serving only in a de facto status at the time of retirement for length of service is entitled to such retirement if he holds no separate de jure status. Moreover, if the de facto officer also holds a lower de jure grade, is he entitled to retirement only in the lower grade?

Unlike the disability retirement statute, the statutes⁷⁸ governing retirement of officers for length of service do not expressly require entitlement to basic pay as a prerequisite to retirement. However, the statute involved in the earlier Comptroller General decision⁷⁹ denying retirement for disability in a de facto grade did not require entitlement to basic pay. That statute authorized retirement for disability incurred "while serving under a temporary appointment in a higher rank."⁸⁰ The Comptroller General ruled that only a de jure temporary appointment satisfied the requirements of the statute. In this connection, the current statutes authorizing retirement for length of service speak in terms of "a regular commissioned officer of the Army"⁸¹ and "a regular or reserve commissioned officer of the Army."⁸² Thus, if the Comptroller General were to construe these statutes as strictly as he did the statute in the earlier decision, he might rule that only a de jure officer qualifies as a "regular" or "reserve com-

⁷⁷ See 29 COMP. GEN. 187 (1949).

⁷⁸ 10 U.S.C. §§ 3911, 3918 (1964).

⁷⁹ 29 COMP. GEN. 187 (1949).

⁸⁰ Act of July 24, 1941, ch. 320, § 8, 55 Stat. 604.

⁸¹ 10 U.S.C. § 3918 (1964).

⁸² 10 U.S.C. § 3911 (1964).

DE FACTO MILITARY STATUS

missioned officer of the Army.” Even if the Comptroller General should rule that a *de facto* officer may be retired for length of service, it is very likely that he will add the proviso that the *de facto* service must not have been “prohibited by law.”

4. *Promotion.*

The Judge Advocate General has long been of the opinion that *de facto* service may be credited as time in grade for the purpose of determining eligibility for temporary promotion.⁸³ In a recent decision⁸⁴ The Judge Advocate General indicated that *de facto* service may also be creditable towards permanent promotion. That case involved a person who had been appointed a 2d lieutenant in the Army Reserve, Army Medical Specialist Corps, prior to attaining 21 years of age as required by statute.⁸⁵ The “officer” subsequently entered active duty and served for over two months before she became 21 years of age. The Judge Advocate General ruled that the incumbent achieved *de jure* status upon attaining 21 years of age, and that her active duty service prior to reaching that age was in a *de facto* status. A question remaining for disposition was whether her *de facto* service could be credited towards promotion in the Army Reserve, Concerning this point, The Judge Advocate General said :

Generally, *de facto* service may be credited as time in-grade and length of service for promotion purposes. . . . Under the Comptroller General’s principle that the law may not be construed to reward that which the law prohibits, however, Lt Bennett’s prohibited service could not be utilized in determining her eligibility for promotion. It is unclear, however, whether the Comptroller General’s jurisdiction encompasses the military promotion area. . . . Manifestly, this office is bound by the Comptroller General’s pronouncements concerning pay and allowances, and as greater active duty and retirement monetary entitlements flow directly from a promotion, such questions would appear to fall in the Comptroller General’s ambit of authority. Nevertheless, the issue whether the Comptroller General’s pronouncements bind this office for promotion purposes, need not be reached at this time: Lt Bennett’s *de facto* service may not be credited toward USAR promotion eligibility on other grounds.“

The Judge Advocate General then concluded that the *de facto* service could not be credited towards promotion in the Army Reserve because the statutes⁸⁷ governing USAR promotions con-

”See JAGA 1966/4246, 30 Aug. 1966; JAGA 1957/6709, 28 Aug. 1957; JAGA 1953/4237, 19 May 1953.

⁸⁴ JAGA 1966/4812, 8 Feb. 1967.

⁸⁵ 10 U.S.C. § 3357 (1964).

⁸⁶ JAGA 1966/4812, 8 Feb. 1967.

⁸⁷ 10 U.S.C. §§ 3357, 3360, 3363 (1964).

39 MILITARY LAW REVIEW

template credit for service commencing at age 21. In other words, after avoiding the question of whether the Comptroller General's "prohibited by law" rule⁸⁸ applies to promotion, The Judge Advocate General, in effect, adopted the rule by denying credit for the de facto service because it was prohibited by statute.

Although the opinion did not concern Regular Army promotions, in view of the sweeping statement that "[g]enerally, *de facto* service may be credited as time in-grade and length of service for promotion purposes . . .," it would appear that the same rule would apply to Regular Army promotions. Considering the opinion as a whole, the rule appears to be that de facto service is creditable towards both temporary promotion (AUS) and permanent promotion in any component unless the service is "prohibited by law."

IV. THE DE FACTO ENLISTED MAN

A. ELEMENTS OF DE FACTO ENLISTED STATUS

Technically, the principles of de facto status apply only to officers. However, these principles are applied "by analogy" to enlisted members.⁸⁹ Thus, the Comptroller General has come to recognize de facto enlisted status under approximately the same conditions required in the case of officers.⁹⁰ The elements of de facto enlisted status are: (1) the position actually existed; (2) the position must have been occupied under "color of authority," *i.e.*, not by a volunteer or usurper; (3) there was good faith on the part of the individual assuming the position; and (4) the individual discharged the functions of the position.⁹¹

1. *Background.*

It is readily apparent that the elements of de facto enlisted status, enumerated above, are identical to the elements of de facto officer status. In effect, "position" has merely been substituted for "office." Moreover, the elements have the same meaning and effect as their counterparts in de facto officer status, and for the most part the rules concerning de facto officers discussed in the preceding chapters are applicable to enlisted members in comparable situations.

However, in the process of arriving at this common ground, a

⁸⁸ For a discussion of the Comptroller General's "prohibited by law" rule, see part III.B.2. *supra*.

⁸⁹ See 39 COMP. GEN. 742 (1960).

⁹⁰ See, *e.g.*, 41 COMP. GEN. 293 (1961); 41 COMP. GEN. 298 (1961).

⁹¹ JAGA 1966 4146, 15 Aug. 1966; JAGA 1965'4073, 7 Jun. 1965.

DE FACTO MILITARY STATUS

few of the decisions of the Comptroller General have raised doubt as to whether de facto enlisted status requires good faith in all instances. The most notable of these decisions is one rendered in 1952 concerning the status of fraudulent enlistees.⁹² In that decision the Comptroller General observed :

It long has been the rule in the case of an enlisted person who on entry into the service fraudulently concealed or misrepresented a material fact disqualifying him from enlistment, and who is discharged upon discovery by the Government of the fraud, that his discharge constitutes an avoidance of the contract of enlistment; and the man is not entitled to pay or allowances for any period served under the fraudulent enlistment. *However, by analogy to a de facto officer, he is permitted to retain the pay paid him currently while serving, if the payments otherwise were proper.*⁹³

The emphasized portion of the above quotation appears to be the origin of the statement frequently made that the principles of de facto status are applied "by analogy" to enlisted members.⁹⁴ The irony here is that a sound statement (*Le.*, de facto principles are applied by analogy to enlisted members) is based on a case which not only did not involve de facto status, but did not even require the mentioning of the word de facto.

Nowhere in the opinion did the Comptroller General say that the service of a fraudulent enlistee is in a de facto status, or even that such service is comparable to de facto service. He merely said that, like a de facto officer, a fraudulent enlistee is permitted to retain the compensation received by him during his service. As authority for this proposition, the Comptroller General cited several of his earlier decisions,⁹⁵ none of which even mentioned the word de facto. The key decision relied upon stated merely that:

It has never been the rule to take away from the soldier the pay received in a fraudulent enlistment, unless he has received more pay than he would have been entitled to receive if his enlistment had been legal."

Thus, both de facto officers and fraudulent enlistees are allowed to retain compensation received by them, but that is not to say that fraudulent enlistees serve in a de facto enlisted status. The

⁹² 31 COMP. GEN. 562 (1952).

⁹³ *Id.* at 563 (emphasis added).

⁹⁴ See 39 COMP. GEN. 742, 745 (1960). See also U.S. DEP'T OF ARMY, PAMPHLET No. 27-187, MILITARY AFFAIRS para. 8.5 (1966).

⁹⁵ *E.g.*, 22 COMP. DEC. 538 (1916) : 17 COMP. DEC. 122 (1910) : 12 COMP. DEC. 326 (1905).

⁹⁶ 22 COMP. DEC. 538, 539 (1916).

39 MILITARY LAW REVIEW

fact that the law allows a fraudulent enlistee to retain pay received by him has nothing to do with de facto principles, but is merely part of the law governing the status of fraudulent enlistees. Accordingly, the status of fraudulent enlistees is not a subject which is properly included in a discussion of de facto enlisted status.

Nonetheless, the statement "by analogy to a de facto officer" has been taken by some authorities to mean that the Comptroller General applied de facto principles to a fraudulent enlistee." Such an interpretation of the decision could lead to the conclusion that good faith is not always necessary to establish de facto enlisted status, since it is obvious that a fraudulent enlistee has not acted in good faith. However, when it is understood that he Comptroller General did not say that a fraudulent enlistee has de facto status; that he merely observed that de facto officers and fraudulent enlistees are both allowed to retain compensation received by them; and that he did not apply de facto principles to the status of a fraudulent enlistee in order to justify the retention of pay by such a person, it becomes clear that the status of fraudulent enlistees has nothing to do with de facto status, and the customary elements of de facto status remain intact.

Another decision of the Comptroller General which has caused some doubt as to whether de facto enlisted status always requires good faith is a 1960 decision⁸⁸ concerning the status of minors who enlist and serve in the Army or Air Force prior to attaining the minimum age required for military service. In that decision, the Comptroller General referred to de facto rules in discussing the right of an enlisted member discharged for minority to retain the pay and allowances received by him prior to the time military authorities determined he was a minor. In an earlier decision,⁸⁹ the Comptroller General recognized the right of a member discharged for minority to retain pay received by him without mentioning de facto principles. Thus, it would appear that the reference to de facto rules in the 1960 decision was unnecessary, just as the phrase "by analogy to a *de facto* officer" was unnecessary in the decision concerning the status of fraudulent enlistees. In other words, the law applicable to members discharged for minority allows them to retain pay and allowances received without regard to de facto principles. Viewed in this perspective,

⁸⁷ See U.S. DEP'T OF ARMY, PAMPHLET No. 27-187, MILITARY AFFAIRS para. 8.5 (1966).

⁸⁸ 39 COMP. GEN. 860 (1960).

⁸⁹ 5 COMP. DEC. 543 (1899).

minority service does not involve de facto service, and the lack of good faith of most minors enlisting in the armed forces does not create any problems. Minors are allowed to retain the pay received by them and the principles of de facto status retain their integrity.

A good example of the proper application of de facto principles to enlisted status is found in a Comptroller General decision¹⁰⁰ concerning the status of persons enlisted or inducted who, after having performed active duty for some time, are discovered to have been declared mentally incompetent by a court prior to entrance into military service. Since the enlistment of such persons is prohibited by statute,¹⁰¹ the Comptroller General considers their enlistment or induction to be void. However, such persons are considered as having served in a de facto status, and are allowed to retain pay and allowances received prior to discovery of the judicial decree by military authorities.¹⁰²

2. De Facto Status of Enlisted Members Erroneously Serving in Higher Grade.

One of the most common situations giving rise to de facto status is where an enlisted member erroneously occupies a higher grade, either because of a void promotion or because of a failure of military authorities to put a reduction into effect. In this type of situation the Comptroller General and The Judge Advocate General have consistently maintained that de facto enlisted status requires the presence of the four traditional elements, *i.e.*, position existed, color of authority, good faith, and performance of duties.¹⁰³

Perhaps the best example of this type of situation is where a member is convicted by court-martial and receives a sentence which includes a punitive discharge, confinement at hard labor, or hard labor without confinement, and yet is not reduced to the lowest enlisted grade as required by Article 58a, *Uniform Code*

¹⁰⁰ 39 COMP. GEN. 742 (1960).

¹⁰¹ 10 U.S.C. §§ 3253, 5532 (1954).

¹⁰² "The statutory bar applies only to persons who have been declared mentally incompetent *by a court* prior to entrance into military service. Persons who, after enlistment or induction, are found by medical authorities to have been mentally incompetent at the time of enlistment or induction, but who have not been judicially determined to be insane prior to service, are not covered by the statute. Therefore, such persons have de jure status until such time as they are released from military control. See 39 COMP. GEN. 742 (1960).

¹⁰³ See 41 COMP. GEN. 293 (1961); 41 COMP. GEN. 298 (1961); JAGA 1965/4073, 7 Jun. 1965; JAGA 1962/3846, 2 May 1962.

39 MILITARY LAW REVIEW

of *Military Justice*. In a recent case¹⁰⁴ submitted to The Judge Advocate General, the sentence received by a private first class at his trial by special court-martial included confinement at hard labor. Although the convening authority suspended the sentence, he did not take appropriate action under Army regulations¹⁰⁵ to retain the enlisted man in grade. Nonetheless, the private first class was not reduced, but was retained in grade and was subsequently promoted to specialist four. The Judge Advocate General expressed the opinion that, although the member was reduced to the lowest enlisted grade by operation of law upon approval of the sentence to confinement at hard labor by the convening authority, the facts of the case were sufficient to establish that the member had served as a de facto private first class and then as a de facto specialist four. In reaching this conclusion, The Judge Advocate General noted that since the member was never administratively reduced, he apparently occupied the grade of private first class under "color of authority," and the subsequent invalid promotion to specialist four provided sufficient authority for his assuming that grade. Furthermore, nothing in the file indicated that the member had not discharged the functions of both grades or that he had not acted in good faith, or that he was aware of his automatic reduction to private (E-1) by operation of law.

To briefly recapitulate, although the principles of de facto status technically apply only to officers, they are applied "by analogy" to enlisted members. This means that *all* of the elements of de facto officer status are applied "by analogy" to enlisted members, with the result that the elements of de facto enlisted status are identical to those of de facto officer status, *i.e.*, position existed, color of authority, good faith, and performance of duties. Earlier decisions of the Comptroller General referring to a benefit enjoyed by both de facto officers and enlisted members discharged for fraudulent enlistment or minority (*i.e.*, retention of pay received) do not properly concern de facto enlisted status.

B. BENEFITS OF DE FACTO ENLISTED STATUS

The benefits of de facto enlisted status are substantially the same as those enjoyed by de facto officers.

1. Pay and Allowances.

A de facto enlisted member is not entitled to pay and allowances; however, he is allowed to retain pay and allowances received by

¹⁰⁴ JAGA 1966/4146, 15 Aug. 1966.

¹⁰⁵ "Army Reg. No. 624-200, para 31h(1) (3 Jul. 1962).

him while in a de facto status.¹⁰⁶ Since he is not entitled to pay and allowances, he may not recover accrued pay which he had not yet collected when his de facto status terminated.¹⁰⁷ In this connection, assuming that the Comptroller General applies the same rule he has followed in the case of de facto civilian employees, payroll deductions for the purchase of United States savings bonds are considered unpaid pay and may not be recovered after termination of de facto status.¹⁰⁸ On the other hand, assuming that the Comptroller General applies the same rule he has followed in the case of fraudulent enlistees, a soldier's deposits are considered as pay received by the member and held in trust by the Government for him, and therefore may be collected with accrued interest even after termination of de facto status.¹⁰⁹

2. Longevity.

Unless "prohibited by law," service performed while in a de facto enlisted status is creditable in computing years of service for longevity pay purposes.¹¹⁰ "Prohibited by law" has the same meaning here as in the case of de facto officers, *i.e.*, a defect which renders the de facto enlisted member ineligible for de jure status.¹¹¹

3. Retirement.

Although the Comptroller General decisions concerning creditability of de facto service for retirement purposes have involved officers, there is no reason to believe the Comptroller General will not apply the same rules in the case of de facto enlisted members. Assuming the same rules do apply, unless "prohibited by law," de facto service is creditable in computing total years of service **for** retirement for length of service purposes.¹¹² However, a de facto member is not eligible for disability retirement while serving only in a de facto status.¹¹³ The Comptroller General has not had occasion to decide whether a de facto member is eligible for

¹⁰⁶ "See 41 COMP. GEN. 293 (1961); 39 COMP. GEN. 312 (1959); JAGA 1966/4146, 15 Aug. 1966.

¹⁰⁷ See 39 COMP. GEN. 742 (1960).

¹⁰⁸ See 31 COMP. GEN. 262 (1952). Of course, bonds already purchased with sums deducted from pay, and actually in the possession of the de facto member, may be retained by him.

¹⁰⁹ See 31 COMP. GEN. 562 (1952); 22 COMP. DEC. 538 (1916).

¹¹⁰ See 32 COMP. GEN. 397 (1953).

¹¹¹ For a discussion of "prohibited by law" see part III.B.2. *supra*.

¹¹² See 44 COMP. GEN. 277 (1964). This means that de facto service is creditable in computing years of service to determine eligibility for retirement and in computing the amount of retired pay to the same extent as de jure service is creditable.

¹¹³ See note 74 *supra* and accompanying text.

39 MILITARY LAW REVIEW

retirement for length of service while serving only in a de facto

4. *Promotion.*

Service in a de facto enlisted status may be credited in computing time in grade necessary for promotion to the next higher temporary grade.¹¹⁵ That this may be a substantial benefit is illustrated in the case 1~ discussed earlier concerning the enlisted member who, although reduced to private (E-1) by operation of law, continued to serve as a private first class and was subsequently promoted to a specialist four. After ruling that the member had served as a de facto private first class and then as a de facto specialist four, The Judge Advocate General noted that under the facts of the case the member had sufficient time in each grade to qualify for de jure promotion to specialist four as of the date he had first occupied that grade in a de facto status.

V. DE FACTO RETIRED MEMBERS

In a case recently submitted to the Comptroller General," a Regular Army sergeant had been retired under 10 U.S.C. 3914 after completing 20 years, active duty. Nearly four years after his retirement it was discovered that his 20 years, qualifying service included 93 days, lost time for absences not in the line of duty. Accordingly, he was recalled to active duty for the purpose of making up the lost time, after which he was again placed on the retired list. The question remaining for disposition by the Comptroller General was whether the sergeant could retain the nearly four years' retirement pay received while not legally retired. The Comptroller General allowed him to retain the retired pay he had received on the theory that he had achieved a de facto retired status. In so ruling, the Comptroller General noted that "[t]he *de facto* doctrine also applies to a retired status."¹¹⁸

How can a retired member achieve de facto status? Two of the four elements of de facto status pose no particular problem: color of authority and good faith. And it is not stretching the concept too far to conclude that a retired member of the Regular Army occupies a "position" on the retired list. But what duties does a retired member perform? In support of his decision the

¹¹⁴ For a discussion of this question see pp. 22-23 *supra*..

¹¹⁵ See JAGA 1966/4146, 15 Aug. 1966; JAGA 1958/2267, 9 May 1958.

¹¹⁶ JAGA 1966/4146, 15 Aug. 1966. See text accompanying note 104 *supra*.

¹¹⁷ 44 COMP. GEN. 258 (1964).

¹¹⁸ *Id.* at 260.

DE FACTO MILITARY STATUS

Comptroller General relied primarily on two cases, *Badeau v. United States*¹¹⁹ and *Miller v. United States*.¹²⁰

In the *Badeau* case, one of the questions before the United States Supreme Court was whether a retired officer could retain the retired pay received by him if he was not legally on the retired list. The Court held:

But inasmuch as the claimant, if not an officer *de jure*, acted as an officer *de facto*, we are not inclined to hold that he has received money which, *ex aequo et bono*, he ought to return.

He was paid **as** a military officer . . . and the implications from the findings **is** that he was paid . . . because he was *actually* rendering service, whether subject to assignment thereto or **not**.¹²¹

In the *Miller* case, the Government was seeking to recover over \$17,000 in retirement pay from an officer allegedly illegally retired. After holding that the officer was not legally on the retired list, the Court of Claims concluded:

[H]e was a *de facto* officer, and as such was by his own act, and the concurrence of the authority of the government in good faith subject to the disqualifications of a person on the retired list; *was subject to whatever duties are by law incident to the relation of an officer of that kind*; and . . . subjected himself to all the requirements of the law and regulations applicable to "retired officers."

. . . .

It may be said that the compensation allowed by the payments made to the claimant is disproportionate to the service rendered by him on the retired list; *but the statute giving compensation to such officers, has adjusted the value of his services*, and courts are not permitted to measure the value of the consideration when once fixed by the acts of the parties, or the provisions of law.¹²²

Thus, the Supreme Court assumed that *Badeau* had rendered services because he was paid, and the Court of Claims was satisfied that *Miller* had subjected himself to whatever duties were required by law, and that the law had fixed the value of his services.

The Comptroller General, in the course of his decision that the sergeant had achieved a *de facto* retired status, acknowledged that *de facto* status requires performance of duties; however, he did not indicate which, if either, of the above theories he was following in concluding that a retired member had sufficient duties to perform to qualify as a *de facto* member. In fact, he did not even

¹¹⁹ 130 U.S. 439 (1889).

¹²⁰ 19 Ct. Cl. 338 (1884).

¹²¹ 130 US . 439, 452 (1889) (emphasis added).

¹²² 19 Ct. Cl. 338, 353-55 (1884) (emphasis added).

39 MILITARY LAW REVIEW

discuss the problem of whether a retired member has duties to perform. He merely cited *Badeau* and *Miller* for the proposition that the de facto doctrine also applies to a retired status. In any event, the decision is just and in keeping with the spirit and purpose of the defacto doctrine to prevent hardship to innocent victims of administrative error.

However, the Comptroller General has not been so generous with all retired members. Apparently he is limiting application of de facto principles to members retired for length of active duty service, because in an earlier decision he ruled that de facto principles do not apply to members retired for disability.¹²³

In that case, a member of the Coast Guard was erroneously advised that he was being placed on the Temporary Disability Retired List, when in fact by virtue of the findings of the Physical Evaluation Board he was placed on the Permanent Disability Retired List with a permanent disability rating of 40 per cent. Until the error was discovered, the member was paid at the minimum temporary disability rate of 50 per cent. The Comptroller General ruled that he had been legally retired with a 40 per cent disability rating, and that he must refund the difference between the 50 per cent pay he had received and the 40 per cent he was entitled to. The Comptroller General rejected the application of de facto principles, saying: "[T]here appears to be no sound reason why the [de facto] rule should be extended further to cover persons who are on a temporary or a permanent retired list and who have no official duties to perform from day to day." ¹²⁴

It is difficult to understand how a member retired for disability has any fewer duties to perform than does a member retired for length of active duty service. The distinction becomes even more perplexing when it is noted that both *Badeau* and *Miller* were retired for disability! In this regard, the Comptroller General's decision denying de facto status to the member retired for disability did not refer to either the *Badeau* or *Miller* case. Perhaps those cases were overlooked at the time of this decision. In any event, the Comptroller General has not explained why he has distinguished between the two forms of retirement.

The Comptroller General has also ruled that reservists or former reservists transferred to the Army of the United States Retired List after attaining age 60 and completing 20 years' federal service cannot achieve de facto status.¹²⁵ The question arose

¹²³ See 36 COMP. GEN. 632 (1957).

¹²⁴ *Id.* at 634.

¹²⁵ See 38 COMP. GEN. 633 (1959); 29 COMP. GEN. 520 (1950).

DE FACTO MILITARY STATUS

in the case of 454 officers who were retired based in part on service in the National Guard which was not federal service as required by the act¹²⁶ authorizing such retirement. Some of the officer's eligibility for retirement depended on the non-federal service, while others merely received increased pay as a result of it. The Comptroller General ruled that such service was not creditable in either case, and required the refund of all retired pay received as a result of the noncreditable service.

In the view of the Comptroller General, the officers could not be considered as having achieved a de facto retired status because there was no office to fill. The key to this decision was the fact that under the law their entitlement to retirement pay did not depend on membership in any component, but only that they meet the statutory requirements as to age and past service, and that they file application for such pay. "*The status of such persons is essentially different from the status of an officer or enlisted man on the retired list of the Regular Army or the Regular Navy. . . . Hence, this Office would not be justified in concluding that [they] . . . hold an office for the purposes of the established principles relating to de facto officers.*"¹²⁷

In other words, the law authorizing this form of retirement pay does not require that the applicant still have military status, but only that he meet the age and past service requirements. Such a person can receive retired pay even after he has terminated his military status. Therefore, a person receiving retired pay under this law has no office to fill, and does not qualify for de facto status.

VI. STATUTORY PROHIBITIONS AND SERVICE PROHIBITED BY LAW

As previously noted, de facto service is creditable for certain purposes only if such service was not "prohibited by law."¹²⁸ Although the Comptroller General has not defined "prohibited by law," the term apparently refers to provisions of law which render the incumbent ineligible for de jure status, such as being over-age in grade¹²⁹ or lacking United States citizenship when citizenship is required by statute.¹³⁰ Under such circumstances, the

¹²⁸ Army and Air Force Vitalization and Retirement Equalization Act of 1948, ch. 708, tit. 111, 62 Stat. 1087, as amended, 10 U.S.C. §§ 1331-1337 (1964).

¹²⁷ 29 COMP. GEN. 520, 522 (1950) (emphasis added).

¹²⁹ See part III.B.2. *supra*.

¹³⁰ See 44 COMP. GEN. 284 (1964).

¹³¹ See 32 COMP. GEN. 397 (1953).

39 MILITARY LAW REVIEW

de facto member is allowed to retain the pay and allowances he has received, but the de facto service is not creditable towards other benefits of military service, such as longevity pay and retirement for length of service.

Thus, "prohibited by law," as used in cases such as those described above, limits the benefits of de facto status, but does not prevent the existence of de facto status. However, in another line of decisions the Comptroller General has consistently held that "the *de facto* rule may not be applied to nullify the effect of a statutory provision."¹³¹ When this rule is invoked, the *existence* of de facto status is deemed to be precluded by the statutory prohibition, and the incumbent of the office or position is required to refund the compensation he has received.¹³²

The best statement of this rule is found in a Comptroller General decision¹³³ concerning an employee of the United States Agriculture Department who was promoted in violation of minimum service requirements imposed by statute.¹³⁴ In the words of the Comptroller General:

It has been held by this Office that where appointments were made in good faith . . . the employee involved may be considered as having served in a *de facto* status and thus entitled to retain compensation received prior to the time the error was brought to the attention of the administrative officials. . . . However, such cases are clearly distinguishable from those where the salary of a higher grade is paid to an employee contrary to a specific statutory provision prescribing a minimum period of service in grade as a requisite for advancement to a higher grade. . . . *We have held consistently that the de facto rule may not be applied to nullify the effect of a statutory requirement.* . . . Also, we have held that despite the absence of fault on the part of an employee who receives a promotion in contravention of the Whitten Rider, nevertheless he must make refund of the compensation received contrary to its provisions.

. . . Accordingly, under the rules stated above the employee cannot be considered to have been in a de facto status when receiving compensa-

¹³¹ 45 COMP. GEN. 330, 332 (1965); 36 COMP. GEN. 230, 231 (1956); see 29 COMP. GEN. 75 (1949).

¹³² Although the Comptroller General has thus far invoked this rule only in civilian employee cases, the principle would appear to be applicable in comparable situations involving military personnel. Also, as will be seen (note 139 *infra* and accompanying text), the principle has affected retired military members employed by the Government in a civilian position.

¹³³ 36 COMP. GEN. 230 (1956).

¹³⁴ Whitten Rider § 1310(c), 65 Stat. 758, as amended, § 1302, 66 Stat. 122, provides in pertinent part: "No person in any executive department or agency whose position is subject to the Classification Act of 1949, as amended, shall be promoted or transferred to a higher grade, subject to such Act without having served at least one year in the next lower grade"

DE FACTO MILITARY STATUS

tion in violation of the statutory prohibition. Refund of the excess salary so received must be insisted upon."

It is readily apparent that the above decision raises more questions than it answers. For one thing, what kind of "statutory prohibition" is contemplated under this rule? How does a "statutory prohibition" differ from service "prohibited by law?" Unfortunately, the Comptroller General has not provided a clear answer to these questions. However, a few clues are available.

For one thing, the Comptroller General has indicated that the "statutory prohibition" must be contained in a statute. Accordingly, a prohibition contained in a regulation that implements a statute does not come within the rule.¹³⁶

Also, the "statutory prohibition" must be contained in a specific provision of law, such as an appropriation act.¹³⁷ In this connection, the statutory prohibition which precluded de facto status in the case discussed above is contained in an appropriation act.¹³⁸

However, the rule is not limited to statutory prohibitions contained in appropriation acts. Thus, the dual office act of 1894,¹³⁹ prior to its repeal on December 1, 1964, was consistently held by the Comptroller General to be a statutory bar to both de jure and de facto status.¹⁴⁰ That act provided in pertinent part:

No person who holds an office the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars shall be appointed to or hold any other office to which compensation is attached unless specially authorized thereto by law. . . .

The act excepted from its terms enlisted men retired for any cause, officers retired for disability, and officers retired for any cause where elected to office or appointed to office by the President by and with the advice and consent of the Senate. This left officers retired for length of service within the prohibition of the act, when such officers held a nonelective civilian office which did not require Senate confirmation. Moreover, the Comptroller General construed "office" very broadly, to include any position possessing federal functions, duties, appointment, tenure, and salary.¹⁴¹ Retired officers employed in a civilian capacity contrary to this act were required by the Comptroller General to refund all salaries

¹³⁶ 36 COMP. GEN. 230, 231 (1956) (emphasis added).

¹³⁸ See 38 COMP. GEN. 175 (1958).

¹³⁷ See 22 COMP. GEN. 300 (1942).

¹³⁸ Supplemental Appropriation Act of 1952, ch. 664, § 1310(c), 65 Stat. 758.

¹³⁹ Act of July 31, 1894, ch. 174, § 2, 28 Stat. 205.

¹⁴⁰ See 45 COMP. GEN. 330 (1965); 42 COMP. GEN. 260 (1962).

¹⁴¹ See 42 COMP. GEN. 260 (1962).

received in connection with the civilian employment.¹⁴²

Apparently, to qualify as a "statutory prohibition" within the meaning of this rule that statute must specifically bar the individual from holding the office or position, and it is not a "statutory prohibition" if the statute merely declares the individual *ineligible* for the office or position. This conclusion is based on a Comptroller General decision¹⁴³ involving a civilian employee of the Civilian Conservation Corps, who prior to acquiring such employment had been retired for age by another federal agency. A statute in effect at the time provided:

That *no such person* heretofore or hereafter separated from the service of the United States . . . under any provision of law or regulation providing for such retirement on account of age *shall be eligible* again to appointment to any appointive office, position, or employment under the United States. . . .

The Comptroller General ruled that the statute precluded de jure status, but was not "a specific provision of law" which would prevent de facto status. Accordingly, the person was found to be a de facto employee of the Civilian Conservation Corps, and was allowed to retain the salaries received from that employment.

All things considered, one could conclude that:

(1) In order to constitute a "statutory prohibition" which will preclude both de jure and de facto status, the provision of law must be contained in a statute and must specifically prohibit the individual from holding the office or position.

(2) On the other hand, for service to be considered "prohibited by law," thereby precluding certain benefits which would otherwise attach to de facto status but not preventing the existence of de facto status, it is only necessary that there be a provision of law contained in a statute or in a regulation that implements a statute which renders the individual *ineligible* for the office or position.

VII. CONCLUSIONS

In a recent opinion, The Judge Advocate General said: "The *de facto* theory is generally recognized as an equitable one utilized primarily to protect a serviceman, who acted in good faith, from the resulting hardships of government agents' mistakes."¹⁴⁵

From the foregoing statement it is clear that good faith, *i.e.*,

¹⁴² See 45 COMP. GEN. 330 (1965) ; 42 COMP. GEN. 260 (1962).

¹⁴³ 22 COMP. GEN. 300 (1942).

¹⁴⁴ Act of June 30, 1932, ch. 314, § 204, 47 Stat. 404 (emphasis added)

¹⁴⁵ JAGA 1966/4812, 8 Feb. 1967.

the innocent reliance on the acts of government agents, is the most important element of the de facto rule. The other three elements of de facto status—office or position exists, “color of authority,” and performance of duties—constitute additional limitations on the rule.

Viewed in this light, the first question must always be: Did the incumbent believe he was validly invested with the military office, position, or grade in question? This is a subjective inquiry concerned with the individual’s actual or constructive knowledge of the defect in his status. If the individual did not know of the defect, he acted in good faith.

“Color of authority” is closely related to good faith, but whereas good faith is concerned with the subjective knowledge of the incumbent, “color of authority” is an objective analysis of the authority relied upon to determine if such reliance was justified. Generally, for reliance to be justified, the authority relied upon must emanate from an authoritative source, and must consist of some affirmative, direct information of an appointment to the office, position, or grade. In many cases the same evidence will prove or disprove the existence of both good faith and “color of authority,” since the indicia of authority relied upon frequently constitutes the incumbent’s total knowledge of the matter.

Historically, performance of duties is a very important element of de facto status. Certainly, the word “de facto” (“in fact”) in itself implies action. In cases such as *Royer*,¹⁴⁶ involving claims for active duty pay and allowances, the requirement seldom causes any problems because such claims ordinarily do not arise unless the incumbent is threatened with the loss of compensation for services actually rendered. However, the performance of duties requirement has created a curious anomaly where claims based on de facto retired status are concerned. There the Comptroller General has allowed de facto status of members retired for length of active duty service,¹⁴⁷ but has denied such status in the case of members retired for disability because such persons have no duties to perform.¹⁴⁸ Curiously, as support for de facto retired status of members retired for length of active duty service, the Comptroller General has relied upon the *Badeau*¹⁴⁹ and *Miller*¹⁵⁰ cases,

¹⁴⁶ *United States v. Royer*, 268 U.S. 394 (1925). For a discussion of the *Royer* case, see text accompanying notes 5–7 *supra*.

¹⁴⁷ See 44 COMP. GEN. 258 (1964). See text accompanying notes 117–18 *supra*.

¹⁴⁸ See 36 COMP. GEN. 632 (1957). See text accompanying notes 123–24 *supra*.

¹⁴⁹ *Badeau v. United States*, 130 U.S. 439 (1889). See text accompanying notes 120–21 *supra*.

¹⁵⁰ *Miller v. United States*, 19 Ct. Cl. 338 (1884). See text accompanying

39 MILITARY LAW REVIEW

which both allowed de facto status in the cases of members retired for disability.

It is submitted that there is no reason to distinguish between the two forms of retirement. The rationale of the *Miller* case should be adequate to cover both types of retirement. In that case the court concluded that the performance of duties requirement is satisfied if the incumbent performed whatever duties are required by law. Under this interpretation of the performance of duties rule, both members retired for length of active duty service and members retired for disability could attain de facto status.

The fourth element of de facto status—office or position actually exists—is seldom an issue. Apparently, the office or position is presumed to exist in the absence of evidence to the contrary.¹⁵¹ However, the Comptroller General has ruled that reservists or former reservists placed in a retired status after attaining age 60 and completing 20 years' federal service do not hold an office and cannot achieve de facto status.¹⁵² Since the law does not require such persons to retain military status in order to receive retired pay, the decision appears to be technically correct; nonetheless, an argument could be made that such a retired list is a position created by law. And certainly, when, as a result of administrative error through no fault of their own, such persons receive retired pay though not legally entitled to it, there appears to be no reason why they should be treated any less equitably than persons with formal military status.¹⁵³

Accordingly, it is submitted that, in keeping with the equitable purpose of the de facto rule, whenever it appears that good faith and "color of authority" are present, the remaining elements of de facto status should be construed as liberally as possible. In support of this position, it is noted that in both Supreme Court

note 122 *supra*.

¹⁵¹ See *United States v. Royer*, 268 U.S. 394 (1925). For a discussion of this aspect of the *Royer* case, see text accompanying notes 9-12 *supra*.

¹⁵² See 38 COMP. GEN. 633 (1959); 29 COMP. GEN. 520 (1950).

¹⁵³ Pursuant to Act of October 14, 1966, 80 Stat. 902, amending 10 U.S.C. §§ 1331-1337, most of the hardships caused by this rule of the Comptroller General have been alleviated. That act provides that the Secretary of the Army shall notify persons determined to be eligible for retired pay under that chapter. Thereafter, a person's eligibility for retired pay cannot be revoked because of any error in calculating years of service, unless the error resulted directly from the fraud of the person retired. However, the person's pay may be recomputed after correcting the error, which means that persons retired under this provision of law may still have to refund part of their retirement pay if they receive more than they are legally entitled to.

DE FACTO MILITARY STATUS

decisions dealing with de facto military status, the *Royer* and *Badeau* cases, the Court was liberal in its approach to the problem and did not specify formal, rigid requirements. Certainly, those cases would support **a** liberal de facto rule where the issue involved is retention of compensation received.

MILITARY SEARCH AND SEIZURE— PROBABLE CAUSE REQUIREMENT*

By Major Robert D. Hamel**

*This is the fourth***relatively recent article in the area of search and seizure and should permit the reader to cover the field. The author focuses on one aspect of search and seizure: the requirement for probable cause. He discusses such issues as the undisclosed informant and the “shakedown” inspection, and concludes with a recommendation concerning the adoption of a search warrant procedure in the military.*

I. INTRODUCTION

The legal profession is one of a very few groups of trained persons that generally are recognized to have attained the true status of “professionals.” Certainly one of the tests to be applied in determining whether any given group has attained the status of a profession is the development of a language unique to the group, developed for the use and benefit of the profession. It is this “professional language” that is in great part responsible for the respect—and the occasional distrust—that is rendered the professional person by the layman. It is the development of such a language which allows the legal profession to express itself adequately in the execution of its responsibility of making, modifying, interpreting, and changing the law. Any degree of amazement felt by the average citizen at the language employed by the lawyer might well be eased by the realization that lawyers themselves find the language difficult, ever changing, and subject to differing interpretations by their counterparts. No better exam-

*This article was adapted from a thesis presented to The Judge Advocate General’s School, **U.S.** Army, Charlottesville, Virginia, while the author was a member of the Fifteenth Advanced Course. The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General’s School or any other governmental agency.

JAGC, **U.S. Army; Judge Advocate, Headquarters, USARPAC; **B.A.**, 1958, Fort Hays Kansas State College; **LL.B.**, 1961, Washburn University; admitted to practice before the bars of the State of Kansas and the United States Court of Military Appeals.

***Previous recent articles in this area are Nicholas, *The Defendant’s Standing To Object to the Admission of Evidence Illegally Obtained*, 35 **MIL. L. REV.** 129 (1967); Davis, *The “Mere Evidence” Rule in Search and Seizure*, 35 **MIL. L. REV.** 101 (1967); Webb, *Military Searches and Seizures — The Development of a Constitutional Right*, 26 **MIL. L. REV.** 1 (1964).

39 MILITARY LAW REVIEW

ple of the inherent problems existing in the legal language is available than the area of search and seizure.

The fourth amendment to the United States Constitution provides :

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

In any present-day application of constitutional provisions, it is customary to attempt to view the circumstances through the eyes of the framers of the Constitution. Such an approach would seem to be not only very difficult but something less than realistic. Rather, appropriate application of constitutional provisions could be made simply by referring to the basic interests that were paramount in each provision. "The 4th Amendment forbids every search that is unreasonable and is construed liberally to safeguard the right of privacy."¹ With this in mind, each search and seizure must be examined with a view toward safeguarding the right of privacy.

The system of criminal law as it is known in the United States has, as vertebrae in its backbone, a few basic concepts. It is agreed generally that these basic concepts must not be compromised under any circumstance, for fear of the exceptions eventually eliminating the concept. One such concept in our law is that every man is presumed innocent until proven guilty. Any attempt to derogate from such a pure presumption would certainly cause alarm among lawyers and the general public alike. The prevalent attitude is apparent in the statement by Mr. Justice Butler, made with reference to the fourth amendment, that: "The Amendment is to be liberally construed and all owe the duty of vigilance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted."² Mr. Justice Butler's position on the matter seems unassailable. Why, then, should there be any controversy over such a basic concept? To promote understanding as to the existence of the problems to be faced, it is well to recognize that in the area of search and seizure the presumption of innocence is squarely faced with the opposing principle that the law must protect society from criminal elements. Criminal courts

¹United States v. Lefkowitz, 285 U.S. 452, 464 (1932).

²Go-Bart Importing Company v. United States, 282 U.S. 344, 357 (1931).

MILITARY SEARCH AND SEIZURE

in this country ordinarily are not confronted with disposition of the question of an illegal search and seizure which fails to uncover incriminating evidence. Quite the contrary, the courts must apply constitutional guarantees in the face of a search and seizure that has been only too successful and has produced strong evidence of guilt. With their readily apparent duty to protect constitutional rights at direct loggerheads with the also apparent interests of society, conscientious judges are understandably reluctant to allow the guilty to go free. This quandary was aptly described by Mr. Justice Frankfurter in his dissenting opinion in *United States v. Rabinowitz*,³ when he stated: "It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people."⁴

With these opposing and perhaps equal interests at hand, we may turn to the specific problem of probable cause as a prerequisite to all searches authorized under the fourth amendment. While it is true that only "unreasonable" searches seizures are prohibited by the Constitution,⁵ the requirement that the authority to search must be based upon probable cause is related to the question of reasonableness, and all federal searches must be based on probable cause.⁶

Probable cause, though necessary as a prerequisite to any search, is only one issue to be resolved in determining the legality of the search and subsequent seizure and whether the fruits thereby obtained are admissible as evidence in criminal proceedings. This article must necessarily be limited to the issue of probable cause in its relationship to search and seizure in the federal and military practices. The highly important and all-inclusive area of "reasonableness" will not be probed and will be discussed only to the extent necessary to understand the point to be made. The same is necessarily true of all other issues collateral to that of probable cause.⁷ Particular emphasis will be placed upon the military requirement of the probable cause necessary to assure a legally acceptable search and seizure.

³ 339 U.S. 56 (1950).

⁴ *Id.* at 69.

⁵ See *Elkins v. United States*, 364 U.S. 206 (1960).

⁶ See *Wong Sun v. United States*, 371 U.S. 471 (1963); *Draper v. United States*, 358 U.S. 307 (1959); *Carroll v. United States*, 267 U.S. 132 (1925).

⁷ For a more general consideration of search and seizure, see Webb, *Military Searches and Seizures — The Development of a Constitutional Right*, 26 *MIL. L. REV.* 1 (1964).

II. DEFINING THE ISSUE

A number of circumstances may give rise to valid searches in the federal practice. Valid searches may be conducted, of course, under the authority of a search warrant. However, a valid search may also be conducted, incident to an arrest made under the authority of an arrest warrant. Further, a warrantless arrest may result in a subsequently valid incidental search. The third category, or the true "incidental search," although not specifically provided for in the fourth amendment, is not necessarily unreasonable. The common law right of a peace officer to arrest without a warrant and to conduct a search incident thereto was not eliminated by the fourth amendment.⁹ The military practice is not guided by the *Uniform Code of Military Justice*, but paragraph 152 of the *Manual for Courts-Martial, United States, 1951*, provides as examples of lawful searches (1) those conducted under the authority of a lawful search warrant, (2) a search incident to a lawful arrest, (3) a search made to prevent removal or disposal of criminal goods, (4) a search made with the consent of the owner of the property, and (5) a search authorized by a commanding officer. The paragraph, in the first four examples, simply paraphrases those searches which had been found properly authorized in the federal practice and, in the fifth example, provides for the circumvention of the warrant requirement due to military necessity. Paragraph 152 further provides that the examples given are not exhaustive and preserves the legality of searches made in accordance with military custom.

As has been previously stated, regardless of the statutory authority that may be provided for conducting a search and seizure, the existence of probable cause is a prerequisite to the exercise of that authority.¹⁰ How, then, may we define probable cause? The most helpful and often cited generalities are contained in the language of *Brinegar v. United States*:¹⁰

In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and

⁹See *Carroll v. United States*, 267 U.S. 132 (1925).

¹⁰*Wong Sun v. United States*, 371 U.S. 471 (1963); *Draper v. United States*, 358 U.S. 307 (1959). The present military practice is that "although the military permits certain deviations from civilian practice in the procedures for initiating a search, the substantive rights of the individual and the necessity that probable cause exist therefor remain the same." *United States v. Brown*, 10 U.S.C.M.A. 482, 488, 28 C.M.R. 48, 54 (1959).

¹⁰ 338 U.S. 160 (1949).

MILITARY SEARCH AND SEIZURE

prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved.

"The substance of all the definitions" of probable cause "is a reasonable ground for the belief of guilt." [citations omitted] And this "means less than evidence which would justify condemnation" or conviction. . . . Probable cause exists where "the facts and circumstances within their [the officers'] knowledge, and of which they had reasonably trustworthy information, [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed."

In the military practice, "[p]robable cause to search exists if the facts and circumstances justify a prudent man in concluding that an offense has been or is being committed."?" The appellate bodies in the military further recognize that the test for the existence of probable cause in a given case is the same in military law as in civilian practice.¹³

Certainly some of the confusion concerning probable cause stems from the quality and types of evidence that are allowed to show its existence. In spite of the dictum in *Grau v. United States*¹⁴ to the effect that evidence competent in a jury trial is required to show probable cause, such is not the case. A finding of probable cause may be made on the basis of evidence which would not be competent at trial.¹⁵ It must be remembered that there is a sharp distinction between the two things to be proved—probable cause and guilt. Whereas guilt must be proved beyond a reasonable doubt in criminal trials, the very nature of probable cause requires only a showing of probabilities. The large difference between the two things to be proved is reflected in the quantum of evidence and modes of proof required to establish them.¹⁶ Consequently, the probable cause requirement may be met although the proof upon which it rests is not only insufficient to prove guilt but would be totally inadmissible at trial on the issue of guilt.

It is not surprising, in view of the rather broad generalities provided by the courts, that close questions of probable cause sometimes are decided not as an independent issue but are commingled with a consideration of the overall reasonableness

¹³ *Id.* at 175-76. (brackets by the Court).

¹⁴ *United States v. Ness*, 13 U.S.C.M.A. 18, 23, 32 C.M.R. 18, 23 (1962).

¹⁵ *See* ACM S-20491, Maginley, 32 C.M.R. 842 (1962), *aff'd*, 13 U.S.C.M.A. 445, 32 C.M.R. 445 (1963).

¹⁶ 287 U.S. 124 (1932).

¹⁷ *See* *Rugendorf v. United States*, 376 U.S. 528 (1964); *Husty v. United States*, 282 U.S. 694 (1931).

¹⁸ *See* *Jones v. United States*, 362 U.S. 257 (1960).

of the search. The search for probable cause itself has led to decisions based on the facts and circumstances of each case¹⁷ and the total atmosphere of the case.¹⁸ In an effort to ascertain what constitutes probable cause, it is not unusual—nor is it in error—to utilize a form of inverse logic and eliminate first those facts which do *not* establish probable cause. For example, an alleged consent to search which is in reality a mere submission to authority will neither provide probable cause nor eliminate the necessity therefor, as “[p]robable cause cannot be found from submissiveness, and the presumption of innocence is not lost or impaired by neglect to argue with a policeman.”¹⁹ In determining the quantum necessary, the military practice has not allowed common rumor or report, suspicion, or even strong reason to suspect as a substitute for probable cause.²⁰ Probable cause, therefore, must be found to lie somewhere between strong reason to suspect, and proof of guilt beyond a reasonable doubt.²¹ It is with these rather vague generalities that we may begin to seek out the manner in which the rules provided are applied in the federal and military practices.

III. THE FEDERAL PRACTICE

A. GENERAL

The fourth amendment to the United States Constitution prohibits all unreasonable searches and makes probable cause a prerequisite for the issuance of warrants. The requirement of probable cause is also recognized by the Federal Rules of Criminal Procedure, rule 41.²² In any given search, there are really two determinations to be made: First, was there probable cause for the search? Second, was the search, under all the facts and circumstances, reasonable?²³ To be considered, then, are the circumstances under which a constitutionally approved search may be made. The fourth amendment, on its fact, allows searches to be made upon issuance of a valid search warrant. The fourth amendment further allows a warrant to be issued for the arrest

¹⁷ See *United States v. Rabinowitz*, 339 U.S. 56 (1950).

¹⁸ See *United States v. Conlon*, 14 U.S.C.M.A. 84, 33 C.M.R. 296 (1963).

¹⁹ *United States v. Di Re*, 332 U.S. 581, 595 (1948).

²⁰ See, e.g., *United States v. Westmore*, 14 U.S.C.M.A. 474, 34 C.M.R. 254 (1964); CM 409442, *Johnson*, 33 C.M.R. 547, *pet. denied*, 14 U.S.C.M.A. 680, 33 C.M.R. 436 (1963).

²¹ See *Brinegar v. United States*, 338 U.S. 160, 225 (1949).

²² See *United States v. Ventresca*, 380 U.S. 102 (1965).

²³ See *United States v. Rabinowitz*, 339 U.S. 56 (1950).

MILITARY SEARCH AND SEIZURE

of a particular person. A search may be incident to the arrest of an individual based on the issuance of an arrest warrant, but of course the arrest may not be used as a pretext to search.²⁴ Although not specifically authorized by the amendment, a lawful arrest may be made without a warrant, if based on probable cause. Therefore, the existence of probable cause is an essential prerequisite not only to the issuance of a search warrant but also to an arrest, with or without warrant. Most incidental searches—*i.e.*, incident to arrest—are reasonable or unreasonable depending upon the existence of probable cause to make the arrest. But even if probable cause exists, a search nevertheless may be unreasonable in its execution.²⁵ The search, though founded on probable cause, must be confined to the fruits or instrumentalities of a crime or to contraband, for if the search is for “mere evidence,” it is unreasonable.²⁶ The physical area of the search,²⁷ the practicability of obtaining a search warrant,²⁸ and the purpose and motivation of the search,²⁹ are some considerations which may enter into the determination of the reasonableness of the search—assuming the prerequisite probable cause has been established.

E. PROBABLE CAUSE FOR WARRANT—SEARCH AND ARREST

The legality of any given search and seizure may not be predetermined by compliance with only one of the constitutional commands contained in the fourth amendment. The mere fact that a search warrant has been issued will not necessarily suffice, for probable cause is an indispensable absolute for the warrant.³⁰ A warrant issued without probable cause is invalid, and evidence obtained as a result of such a search warrant is inadmissible in a criminal trial—state, as well as federal.³¹ Conversely, as probable cause is a prerequisite to the issuance of a warrant and a subsequent lawful search, probable cause in itself cannot justify a search without a warrant, for “[w]ere federal officers free to search without a warrant merely upon probable cause to believe

²⁴ See *United States v. Lefkowitz*, 285 U.S. 452 (1932).

²⁵ See *United States v. Harris*, 321 F.2d 739 (6th Cir. 1963).

²⁶ See Davis, *The “Mere Evidence” Rule in Search and Seizure*, 35 MIL. L. REV. 101 (1967), for a detailed discussion of this area.

²⁷ See *Harris v. United States*, 331 U.S. 145 (1947).

²⁸ See *Chapman v. United States*, 365 U.S. 610 (1961).

²⁹ See *Gilbert v. United States*, 291 F.2d 586 (9th Cir. 1961).

³⁰ *Jones v. United States*, 362 U.S. 257 (1960).

³¹ *Aguilar v. Texas*, 378 U.S. 108 (1964).

39 MILITARY LAW REVIEW

that certain articles were within a home, the provisions of the Fourth Amendment would become empty phrases, and the protection it affords largely nullified."³² The problem thus presented is: What evidence is required, and of what quality and quantity must it be, to constitute probable cause for the issuance of a warrant?

For a warrant to be issued, an affidavit must set out a statement of facts showing probable cause to believe that a crime has been committed,"" that is reasonable grounds for belief of guilt.³⁴ Further, the evidence relied upon must be such as to show the existence of probable cause at the time the warrant is issued, not at some antecedent time." Whether the proof meets this test must be determined by the circumstances of each case.³⁶ Statements of suspicion and belief will not justify the issuance of a warrant, unless the facts and circumstances upon which the suspicion or belief rests are detailed sufficiently to allow the issuing officer to find probable cause.³⁷ By the same token, an affidavit that merely asserts a belief that certain statements are true is an insufficient basis for the issuance of a warrant." Conclusory affidavits which merely state opinions without detailing the underlying circumstances will not support a finding of probable cause.³⁹ However, it should be noted at this point that, although the affidavits submitted in requesting the issuance of a search warrant may be subject to considerable inquiry at trial, the fact that a warrant has been issued is of some value. There is some authority to support the proposition that the issuing magistrate's acceptance of the affidavit as truthful is presumptive and the burden of initially showing potential infirmities is upon the defendant.⁴⁰ Hearsay may be the basis for the issuance of a warrant, so long as a substantial basis for crediting the hearsay is shown." A review of the cases discussing evidence sufficient to establish probable cause for the issuance of a warrant reveals that almost any and all evidence of any probative value may be presented to support a finding of probable cause. For example,

³² *Jones v. United States*, 357 U.S. 493, 498 (1958).

³³ *See Dumbra v. United States*, 268 U.S. 435 (1925).

³⁴ *See Brinegar v. United States*, 338 U.S. 160 (1949).

³⁵ *See Sgro v. United States*, 287 U.S. 206 (1932).

³⁶ *Id.*

³⁷ *See Nathanson v. United States*, 290 U.S. 41 (1933).

³⁸ *See Grau v. United States*, 287 U.S. 124 (1932).

³⁹ *See Jones v. United States*, 362 U.S. 257 (1960).

⁴⁰ *See United States v. Halsey*, 257 F. Supp. 1002 (S.D.N.Y. 1966).

⁴¹ *See United States v. Ventresca*, 380 U.S. 102 (1965).

MILITARY SEARCH AND SEIZURE

it has been held that an odor sufficiently distinctive to identify a forbidden substance may be evidence sufficient to justify the issuance of a search warrant." Also, factual inaccuracies in an affidavit do not destroy probable cause, where the inaccuracies are only of peripheral relevancy to the showing of probable cause and do not go to the integrity of the affidavit.⁴³ The inherent danger in the requirement that *the affidavit* must state facts constituting probable cause is that oral testimony cannot be used to remedy defects in the affidavit or complaint.⁴⁴ It is therefore evident that the affiant must not only have within his knowledge facts sufficient to support probable cause, but he must also possess the ability to communicate, by way of affidavit, the knowledge he has to the issuing magistrate.

C. ARREST AND SEARCH WITHOUT WARRANT

An exception to the constitutional requirement that all searches be made pursuant to a properly executed warrant founded on probable cause is the "incidental search," that is, a search made contemporaneous with and incident to a lawful arrest.⁴⁵ The right to search, without a search warrant, the person of an accused when he is legally arrested has always been recognized under English and American law.⁴⁶ However, while a search without a warrant is, within limits, permissible if incident to a lawful arrest, if an arrest without a warrant is to support an incidental search, it must be made with probable cause⁴⁷ to believe that the suspect has committed or was committing an offense.⁴⁸ Most incidental searches are reasonable or unreasonable depending on the existence of probable cause, but even if probable cause for the arrest exists, an incidental search may be unreasonable.⁴⁹ The search must be limited to contraband, or fruits or instrumentalities of the crime; if for mere evidence, it will be unreasonable.⁵⁰ The physical area of the search,⁵¹ the purpose of or motivation

⁴³ See *Johnson v. United States*, 333 U.S. 10 (1948).

⁴⁴ See *Rugendorf v. United States*, 376 U.S. 528 (1964).

⁴⁵ *Giordenello v. United States*, 357 U.S. 480 (1958); *United States v. Freeman*, 165 F. Supp. 121 (S.D. Ind. 1958).

⁴⁶ See *Preston v. United States*, 376 U.S. 364 (1964); *Carroll v. United States*, 267 U.S. 132 (1925).

⁴⁷ See *United States v. Rabinowitz*, 339 U.S. 56 (1950).

⁴⁸ *Henry v. United States*, 361 U.S. 98 (1959).

⁴⁹ See *Wilson v. Schnettler*, 365 U.S. 381 (1961).

⁵⁰ See *United States v. Rabinowitz*, 339 U.S. 56 (1950).

⁵¹ See *Harris v. United States*, 331 U.S. 145 (1947).

⁵² See *United States v. Steck*, 19 F.2d 161 (W.D. Penn. 1927).

39 MILITARY LAW REVIEW

for the search (good faith),”“ and the practicability of obtaining a search warrant”” are considerations which will enter into the determination of the reasonableness of the incidental search, although probable cause for the arrest without a warrant is present in abundance.

Returning once again to generalities, it may be said that when there is probable cause for believing that an offense is being or has been committed that will justify an arrest, it will also justify a search and seizure incident thereto without a search warrant.⁵⁴ But, it must be kept in mind that probable cause for the arrest usually must be combined with a showing of the necessity to search without securing a search warrant. The failure to procure a search warrant where it is practicable to do so is a significant factor which may be considered in determining the reasonableness of the search.” The bulk of litigation with reference to searches does not arise in regard to the validity of executed warrants, but rather it focuses on the incidental search. One of the problems faced is whether the arrest preceded the search, or whether the arrest was made on the basis of evidence discovered as a result of the search. The latter situation results in an illegal, general, exploratory search and is not a true incidental search. A general search is one made without a search warrant and without a preceding arrest, and searches made without warrant or arrest, regardless of the existence of probable cause, are unreasonable.⁵⁶ The arrest must precede the search and must be based on probable cause. A search is either valid or invalid at its inception and does not change character dependent upon its success.⁵⁵ In the case of *Agnello v. United States*,⁵⁸ government agents made arrangements for a “buy” with sellers of narcotics. One of the sellers was observed leaving for the purpose of obtaining narcotics for the sale and going to Agnello’s home. After arresting

⁵² See *Wilson v. Schnettler*, 365 U.S. 281 (1961).

⁵³ See *Chapman v. United States*, 365 U.S. 610 (1961); *United States v. Jeffers*, 342 U.S. 48 (1951).

⁵⁴ But see, *Chapman v. United States*, 365 U.S. 610 (1961); *Johnson v. United States*, 333 U.S. 10, 13 (1948): “Any assumption that evidence sufficient to support a magistrate’s disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people’s homes secure only in the discretion of police officers.”

⁵⁵ See *Johnson v. United States*, 333 U.S. 10 (1948) *United States v. Cally*, 259 F. Supp. 539 (S.D.N.Y. 1966).

⁵⁶ *Taylor v. United States*, 286 U.S. 1 (1932).

⁵⁷ See *Wong Sun v. United States*, 371 U.S. 471 (1963) ; *Miller v. United States*, 357 U.S. 301 (1958).

⁵⁸ 269 U.S. 20 (1925).

MILITARY SEARCH AND SEIZURE

the sellers (not at Agnello's home), the agents returned to Agnello's home and searched. Agnello was arrested some time later. The Court refused to admit as evidence incriminating items found in Agnello's home, holding that the search was general, not incidental to the arrest, and therefore unreasonable. Apparently the search could have been conducted legally, had the agents secured a search warrant, or even if they had arrested Agnello at his home and conducted the search incident to his arrest. As to the search conducted, the Court stated: "[S]uch searches are held unlawful notwithstanding facts unquestionably showing probable cause."⁵⁹

What actually constitutes probable cause to arrest without a warrant is, of course, dependent upon the circumstances, but the rule is clear that arrest without a warrant is an exception, and the courts have required exceptional circumstances for a valid incidental search. They have placed the burden of showing the circumstances on those seeking the exception.⁶⁰ A further restriction is that a police officer may arrest without a warrant one believed by him, upon probable cause, to have been guilty of a felony, but he may arrest without a warrant one guilty of a misdemeanor only if it is committed in his presence.⁶¹ Suspicion is not enough to create the probable cause necessary for an arrest without a warrant, nor will good faith on the part of the arresting officer lessen the requirement.⁶² Also, probable cause may not be inferred from the failure of a suspect to protect his arrest.⁶³

With the apparent distaste felt by the courts for the incidental search, and even the arrest without warrant, why then are there so many cases involving the incidental search? The answer is simply that there are sufficient cases involving unusual circumstances that there is a real need for law enforcement officers to search incident to an arrest. In *Draper v. United States*,⁶⁴ a narcotics agent was told by a reliable informant that Draper was a peddler of narcotics and that he had gone to Chicago to obtain a new supply and would return by train on a certain day or the day after. Draper was described by the informant and was to be recognized further by his carrying a tan zipper bag and by his manner of walking fast. The agent met the train from Chicago,

⁵⁹ *Id.* at 33.

⁶⁰ *United States v. Jeffers*, 342 U.S. 48 (1951).

⁶¹ *See Carroll v. United States*, 267 U.S. 132 (1925).

⁶² *See Henry v. United States*, 361 U.S. 98 (1959).

⁶³ *United States v. Di Re*, 332 U.S. 581 (1948).

⁶⁴ 358 U.S. 307 (1959).

39 MILITARY LAW REVIEW

recognized Draper, and arrested him. An incidental search revealed narcotics. In addition to stating that hearsay evidence may be used to support probable cause for an arrest, the Court recognized that there was insufficient information to provide probable cause for a warrant until the agent verified all of the informant's facts. Then, at the moment probable cause existed, the need for an immediate arrest and search was apparent.

In relying on the valid arrest to support a search and seizure, it must be remembered that an arrest may not be used as a pretext to search for evidence. The initial motivation must be for arrest, not for the search. In *United States v. Lefkowitz*,⁶⁵ agents secured an arrest warrant and, after making the arrest, searched the individual's personal papers. The Court, in holding that the purpose of the arrest was to search for evidence of guilt, ruled the evidence obtained therefrom to be inadmissible. "The 4th Amendment forbids every search that is unreasonable and is construed liberally to safeguard the right of privacy."⁶⁶ In *United States v. Jeffers*,⁶⁷ where the weighing of the interests to be protected was under consideration, Mr. Justice Clark expressed the Court's opinion in the following language:

Over and again this Court has emphasized that the mandate of the Amendment requires adherence to judicial processes. . . . Only where incident to a valid arrest . . . or in "exceptional circumstances" . . . may an exemption lie. . . . In so doing the Amendment does not place an unduly oppressive weight on law enforcement officers but merely interposes an orderly procedure under the aegis of judicial impartiality that is necessary to attain the beneficent purposes intended."

While the propriety of a search incident to a valid arrest is well-settled in our law, the courts have on occasion stated that they prefer search warrants and will accept only those incidental searches which are found to be necessary under the circumstances⁶⁹ and will allow the exception to eliminate the constitu-

⁶⁵ 285 U.S. (1932). This citation and the subsequent text is included to point up the danger of incidental searches that have as their basis a "search motivation." It is not intended to create the impression that there are not cases contra. One contra example is *United States v. Rabinowitz*, 339 U.S. 56 (1950), where an exception in the area of the accused's person and that area under his immediate control was stated. For further development of this area, see, *e.g.*, *United States v. Ventresca*, 380 U.S. 102 (1965); *Chapman v. United States*, 365 U.S. 610 (1961); *Harris v. United States*, 331 U.S. 145 (1947).

⁶⁶ 285 U.S. at 464.

⁶⁷ 342 U.S. 48 (1951).

⁶⁸ *Id.* at 51.

⁶⁹ If the attack is on a warrantless search and is based on an alleged lack of probable cause, the burden of proof is on the government to show that

MILITARY SEARCH AND SEIZURE

tional mandate for an orderly judicial process.

The requirement of exceptional circumstances for an incidental search, and for the arrest itself, brings to light the weight given to certain factors most often relied upon by law enforcement officers to support a warrantless arrest. A furtive gesture on the part of a suspect, or other actions in the presence of law enforcement officers which lead them to believe or solidify their belief that he is guilty of a given offense, are often relied on to show both probable cause for the arrest and necessity for the search. The most obvious furtive gesture is an attempt to escape the scene. While furtive gestures generally have been recognized to be relevant to the issue of probable cause for arrest without a warrant, the weight given such factors has been small and subject to differing interpretation.⁷⁰ In *Wong Sun v. United States*,⁷¹ the majority of the Court found the suspect's actions susceptible of varied interpretations and would not permit a finding of probable cause on that basis. Quite the contrary, the four dissenting justices on the Court found the furtive gestures of great importance to the arresting officers:

The sole requirement heretofore has been that the knowledge in the hands of the officers at the time of the arrest must support a "man of reasonable caution in the belief" that the subject had committed narcotics offenses. . . . That decision is faced initially not in the courtroom but at the scene of arrest where the totality of the circumstances facing the officer is weighed against his split-second decision to make the arrest.⁷²

It is probably sufficient to say that while furtive gestures may serve to strengthen probable cause for the arrest, this factor will never validate an arrest basically deficient for want of probable cause.

The entire problem of probable cause for an arrest and incidental search and the necessary weighing of equities was recognized in *Brinegar v. United States*,⁷³ where it was stated:

These long-prevailing standards seek to safeguard citizens from rash there existed grounds for the officer's good faith belief of probable cause before the search. If the attack is on a search made with a warrant and is based on an allegation that the warrant was issued on something less than probable cause, the burden of proving that allegation is on the defendant. See *Chin Kay v. United States*, 311 F.2d 317 (9th Cir. 1962); *United States v. Halsey*, 257 F. Supp. 1002 (S.D.N.Y. 1966).

⁷⁰ See *Henry v. United States*, 361 U.S. 98 (1959); *Husty v. United States*, 282 U.S. 694 (1931).

⁷¹ 371 U.S. 471 (1963).

⁷² *Id.* at 499.

⁷³ 338 U.S. 160 (1949).

39 MILITARY LAW REVIEW

and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice.⁷⁴

Though the opposing equities are clearly established in the general rules, their application in factual situations continues to be a problem that can be resolved only on a case-by-case basis.

IV. PROBABLE CAUSE THROUGH HEARSAY—THE INFORMANT

A. *GENERAL*

The mere mention of the word "informant," in the law or in any other connotation, immediately brings to mind thoughts of shady-type characters, too weak-willed to secure the benefits of society on their own productivity. The informant is always thought of as a despicable character who earns his living—and assures his freedom from imprisonment—by the sale of information of criminal activities to law enforcement officials. The image is well-established, and little would be gained by pointing out the number of ordinary citizens that report criminal activity, not for pay but out of a sincere desire to assist in the maintenance of law and order. However, both must be classed as informants. The informant, as he is generally known, is really a faceless individual who seldom makes an appearance in the courtroom. Such an appearance would destroy his value, as it would reveal his identity and render him useless for further investigation. The information given is surrendered usually on the condition that its source remain confidential. The information is often of little direct probative value but is relevant only on the issue of probable cause or to furnish investigative leads. Regardless of the inherent problems, it is recognized universally that the informant is a necessary tool of law enforcement, particularly in the area of providing probable cause to arrest and search.

The rules established with regard to the use of informer infor-

⁷⁴ *Id.* at 176.

MILITARY SEARCH AND SEIZURE

mation are general in nature and do not lend themselves to distinction between probable cause for a warrant and probable cause for an incidental search. In *Brinegar v. United States*,⁷⁵ the Court stated the basis for the acceptance of hearsay information to provide probable cause:

Probable cause exists where "the facts and circumstances within their [the officers'] knowledge, and of which they had *reasonably trustworthy information*, [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed."

The remaining issue is: What constitutes "reasonably trustworthy information"? It must be apparent that not just *any* statement by *anyone* will be sufficient to establish probable cause. The information presented must be corroborated in some manner, though there are exceptions to this rule. When a law enforcement officer receives information through some means of communication from another officer in a different part of the country, he may rely on it for an arrest and search of the person implicated.⁷⁷ Such an exception to the rule requiring corroboration is based on the "built-in credibility" of the official report. Of more frequent concern is the victim's complaint as probable cause for an arrest and search. Only recently have the civilian courts allowed a victim to provide probable cause without corroboration? The military also appears to allow the victim's complaint a great degree of credibility.⁷⁹ The United States Court of Military Appeals would seem to lend the victim a greater degree of credibility because he is available for cross-examination by the defense.

The fact that the complaint was not sworn to, corroborated, or verified does not vitiate the existence of probable cause, as alleged by the appellants. Here the complainant was the victim and not an unidentified informant. . . . It is recognized that complaints registered by actual victims of offenses, unlike the reports of unidentified informers, do not require the same corroboration or verification in order to serve as probable cause for an arrest."

⁷⁵ 338 U.S. 160 (1949).

⁷⁶ *Id.* at 175, quoting from *Carroll v. United States*, 267 U.S. 132, 162 (1925) (brackets by the Court; emphasis added).

⁷⁷ *See United States v. McCormick*, 309 F.2d 367 (7th Cir. 1962).

⁷⁸ *See Williams v. United States*, 308 F.2d 326 (D.C. Cir. 1962); *Washington v. United States*, 263 F.2d 742 (D.C. Cir. 1959).

⁷⁹ *See United States v. Doyle*, 1 U.S.C.M.A. 545, 4 C.M.R. 137 (1952); *ACM 4332, Kofnetka*, 2 C.M.R. 773 (1952).

⁸⁰ *United States v. Herberg*, 15 U.S.C.M.A. 247, 250, 35 C.M.R. 219, 222 (1965).

39 MILITARY LAW REVIEW

The Court further observed that the "passing on" of information by others in the military police organization required no specific corroboration, but rather allowed action based upon the totality of the information known.⁸¹

B. CORROBORATION THROUGH RELIABILITY

The general rule is that informant's information may establish probable cause only if there is corroboration. The corroboration may be provided by showing the reliability of the informant or by showing the truthfulness of his information by independently ascertained facts. Generally, the degree of corroboration required to establish the informant's reliability is greater than that required when the informant's work is corroborated by independent sources. This reflects the basic distrust of informants as a group. However, it is possible to have information provided by a single informant constitute probable cause when the informant's previous reliability has been established.⁸² At the far end of the spectrum, probable cause will probably never be found to exist when there is reliance solely upon an informer's information when the informer had not previously been relied upon.⁸³

Probable cause generally is found where reliance is placed upon a sole informant who has previously proved reliable, although the officer arresting or seeking a warrant has no personal knowledge of the facts communicated.⁸⁴ There is also good reason to allow the ordinary citizen a great degree of reliability and perhaps find probable cause to exist where a single citizen—as opposed to an informant—has disclosed information to the authorities.⁸⁵ The manners in which the informant's reliability may be established are many and varied. Some factors found relevant to the question of reliability and necessary to an adequate elaboration are the length of time the officer has known and dealt with the infor-

⁸¹ *Id.* at 251, 35 C.M.R. at 223.

⁸² *See* *Hawkins v. United States*, 288 F.2d 537 (8th Cir. 1961).

⁸³ *See* *Wong Sun v. United States*, 371 U.S. 471 (1963); *Cervantes v. United States*, 263 F.2d 800 (9th Cir. 1959).

⁸⁴ *See* *Draper v. United States*, 358 U.S. 307 (1959); *United States v. Gurnes*, 258 F.2d 530 (2d Cir. 1958).

⁸⁵ "Chief Judge Quinn's reasoning is expressed in his dissent in *United States v. Davenport*, 14 U.S.C.M.A. 152, 160, 33 C.M.R. 364, 372 (1963): "A police officer, or an officer authorized to order a search, has the right, and should be expected as a reasonable person, to act on inherently credible information relating to a crime received from an identifiable person *not known* to be engaged in conduct tending to discredit his reliability. In other words, the report of crime by an ordinary person has built-in credibility." (emphasis by the Court)

MILITARY SEARCH AND SEIZURE

mer,⁸⁶ the number of tips that have been received,⁸⁷ the character of the information received,⁸⁸ the general reputation of the informer,⁸⁹ the manner in which the informer was paid for his information,⁹⁰ and whether, in narcotics cases, the informer himself was an addict.⁹¹ It is actually a rarity to find a case where probable cause has been established solely by the word of one informer, regardless of how reliable he might be. Those cases holding probable cause to have been established by a single reliable informer usually have at least one additional factual basis to support the determination. In *Butler v. United States*,⁹² it was held that proved reliability alone may be a sufficient basis for the establishment of probable cause, when an informer is paid or is employed for that purpose and has previously given reliable tips. However, even in this instance the court relied on the additional element of factual corroboration that the suspect was where the informer had said he would be.

Apart from the rule that an informant of proven reliability may produce information which in itself will be sufficient to establish probable cause, it appears highly desirable to bolster the reliability of the tip by verifying at least some of the facts contained in the information.

C. FACTUAL CORROBORATION

The sufficiency of the corroboration required when using informer information to establish probable cause is directly dependent upon what the corroboration tends to prove. The general rule is that, if the corroborative evidence tends to prove the accuracy of the informer's factual information, much less corroborative evidence, in terms of volume, will be required for the establishment of probable cause. It is also worthy of note that probable cause may be found when reliance is based on informer information which is corroborated by personal knowledge or observation *obtained either before or after receiving the information*.⁹³ A prime example of factual corroboration before *and* after re-

⁸⁶ See *Draper v. United States*, 358 U.S. 307 (1959).

⁸⁷ See *Jones v. United States*, 362 U.S. 257 (1960).

⁸⁸ See *Rose v. United States*, 313 F.2d 666 (9th Cir. 1963).

⁸⁹ See *Rogers v. United States*, 330 F.2d 535 (5th Cir. 1964).

⁹⁰ See *Perry v. United States*, 336 F.2d 748 (D.C. Cir. 1964).

⁹¹ See *id.*

⁹² 273 F.2d 436 (9th Cir. 1959).

⁹³ See *Husty v. United States*, 282 U.S. 694 (1931); *Hamer v. United States*, 259 F.2d 274 (9th Cir. 1958).

39 MILITARY LAW REVIEW

ceiving the information is in *Husty v. United States*.⁹⁴ There, the government agent knew Husty was bootlegger and had arrested him for liquor violations on two prior occasions (corroboration before). An informer told the agent that Husty would be at a certain place on named streets with two carloads of liquor. The agent found Husty, the cars, and the liquor at the exact location provided by the informer (corroboration after). While the Court was satisfied that probable cause was present in abundance, we might digress for a moment and ask whether probable cause was present prior to the arrival of the agent at the scene? The *Husty* case points up the reason for so many incidental searches when probable cause is based on statements of an informant. Quite often the corroboration necessary to establish probable cause is not present until the moment preceding arrest, and then at that moment arrest is necessary—in this case to prevent the disposal or removal of criminal goods. But of course the law enforcement officer may not use the results of the search to bolster the reliability of the information provided. A search which is unreasonable because it lacks probable cause will not become reasonable by what it reveals,⁹⁵ and factual corroboration must be present prior to the search.

It is possible that investigation prompted by a tip may develop corroboration to the extent of showing probable cause entirely apart from the informer's information—for example, where a felony is committed in the presence of a law enforcement officer. More often, the investigation will not develop an independent showing and yet will provide personal observations and other facts strong enough, taken collectively,⁹⁶ to sustain a reasonable belief that the informant's information is accurate. In such cases it is *the information*, as distinguished from its source, that is held to be reliable or accurate⁹⁷ and probable cause thereby established. The fact that the informer is of unproved reliability⁹⁸ or even shown to be a pathological liar⁹⁹ does not necessarily change the result. So long as his information has been verified on a factual

⁹⁴ 282 U.S. 694 (1931).

⁹⁵ *McDonald v. United States*, 335 U.S. 451 (1948); *Byars v. United States*, 273 U.S. 28 (1927).

⁹⁶ The phrase sometimes used in the military is "the totality of the information known." See *United States v. Herberg*, 15 U.S.C.M.A. 247, 251, 35 C.M.R. 219, 223 (1965).

⁹⁷ See *United States v. Woodson*, 303 F.2d 49 (6th Cir. 1962).

⁹⁸ *Id.*

⁹⁹ See *United States v. Irby*, 304 F.2d 280 (4th Cir.), *cert. denied*, 371 U.S. 830 (1962).

MILITARY SEARCH AND SEIZURE

basis, inquiry into the informer's reliability has been deemed superfluous.¹⁰⁰

It is also possible to utilize a form of collateral corroboration in such situations. The furtive gesture may fit into this category, as well as the suspect's being at a place where his presence throws suspicion on him. This latter factor, much like the furtive gesture, is not accorded much weight, but if his unexplained presence corroborates informer information or is added to other factors which would seem to indicate his guilt, it might be enough to show probable cause.¹⁰¹

V. THE MILITARY REQUIREMENT OF PROBABLE CAUSE

While the *Uniform Code of Military Justice* is silent on the question of searches and seizures, the *Manual for Courts-Martial, United States, 1951*, paragraph 152, provides in part:

The following searches are among those which are lawful:

A search conducted in accordance with the authority granted by a lawful search warrant.

A search of an individual's person, of the clothing he is wearing, and of the property in his immediate possession or control, conducted as an incident of lawfully apprehending him.

A search under circumstances demanding immediate action to prevent the removal of disposal of property believed on reasonable grounds to be criminal goods.

A search made with the freely given consent of the owner in possession of the property searched.

A search of property which is owned or controlled by the United States and is under the control of an armed force, or of property which is located within a military installation or in a foreign country or in occupied territory and is owned, used, or occupied by persons subject to military law or to the law of war, which search has been authorized by a commanding officer (including an officer in charge) having jurisdiction over the place where the property is situated or, if the property is in a foreign country or in occupied territory, over personnel subject to military law or to the law of war in the place where the property is situated. The commanding officer may delegate the general authority to order searches to persons of his command. This example of authorized searches is not intended to preclude the legality of searches made by military personnel in the areas outlined above when made in accordance with military custom.

The first four examples provided in paragraph 152 are pretty much a restatement of the searches that have been found unlawful

¹⁰⁰See *Katz v. Peyton*, 334 F.2d 77 (4th Cir.), cert. denied, 379 U.S. 915 (1964).

¹⁰¹See *United States v. Zimple*, 318 F.2d 676 (7th Cir. 1963).

39 MILITARY LAW REVIEW

in the federal practice.¹⁰² However, it is apparent from reading the last subparagraph of paragraph 152 that the search authorized by a commanding officer is strange to the federal practice. Further, there is no Manual requirement or a showing of probable cause on the part of the commanding officer. Rather, the commanding officer's grant of authority was held in earlier cases¹⁰³ to take the place of both of the federal requirements of probable cause and warrant.¹⁰⁴

In *United States v. Florence*,¹⁰⁵ it was stated that:

[A]s there is in the Manual for Courts-Martial no requirement for the affidavit of probable cause required by civil statute, an appropriate commanding officer's exercise of discretion in authorizing a particular search is the acceptable substitute and cannot ordinarily be questioned. . . .¹⁰⁶

Conversely, those searches and seizures which were not specifically authorized or conducted by a commanding officer generally were required to conform to the rules established in the federal practice :

This rule of exclusion in the Manual is derived from the federal practice. . . . Hence, "it may be inferred that all—certainly most—of the restrictions imposed on its application in a civilian setting will be operative in the area of courts-martial procedure" and it is "provided for the protection of an individual's right to privacy in his personal property and effects". . . . It has also been said that his rule of exclusion, based as it is on the Fourth Amendment to the Constitution of the United States, protects both the guilty and innocent against every unjustifiable intrusion by the Government upon his privacy. . . . [citations omitted].¹⁰⁷

The military tribunals uniformly followed the federal practice in requiring probable cause for arrests and searches incident thereto and followed federal guidelines in holding that suspicion would not provide probable cause for an arrest even if the arrest-

¹⁰² See Webb, *Military Searches and Seizures — The Development of a Constitutional Right*, 26 MIL. L. REV. 1, 2-7 (1964).

¹⁰³ Prior to *United States v. Brown*, 10 U.S.C.M.A. 482, 28 C.M.R. 48 (1959), to be discussed in detail later.

¹⁰⁴ *Richardson v. Zuppann*, 81 F. Supp. 809 (M.D. Penn. 1949); *United States v. Best*, 76 F. Supp. 857 (D. Mass. 1948). See also Judge Latimer's dissent in *United States v. Brown*, 10 U.S.C.M.A. 482, 492-93, 28 C.M.R. 48, 58-59 (1959): "The word 'reasonable' as it must be interpreted in the military law is not limited to those situations where the commander has probable cause to believe a particular person possesses contraband and he alone can be searched."

¹⁰⁵ 1 U.S.C.M.A. 620, 5 C.M.R. 48 (1952).

¹⁰⁶ *Id.* at 622-23, 5 C.M.R. at 50-51; see also *United States v. Rhodes*, 3 U.S.C.M.A. 73, 11 C.M.R. 73 (1953); *ACM 6172, Turks*, 9 C.M.R. 641 (1953).

¹⁰⁷ *ACM 13959, Rhodes*, 24 C.M.R. 776, 787-88 (1957).

MILITARY SEARCH AND SEIZURE

ing officer acted in good **faith**.¹⁰⁸ The reliance on federal case precedent is apparent in the language of *United States v. Hillan*.¹⁰⁹

Ordinarily, then, a search is reasonable if there exists "unusual circumstances" and that the **known** facts before the officers were such as to warrant "a man of prudence and caution" in believing that the offense had been committed, it is usually sufficient. . . . But good faith without actual knowledge is not enough to constitute probable cause.¹¹⁰

Further following the federal practice, no search could be made lawful by what it uncovered, nor would an illegal search provide probable cause for a subsequent **apprehension**.¹¹¹ Incidental searches were allowed much as in the federal **practice**,¹¹² based on the legality of the apprehension under the *Uniform Code of Military Justice*.¹¹³ At the same time, the military tribunals recognized that there were some basic differences between the civilian and military communities and properly allowed for the effect of military necessity¹¹⁴ and the exigencies of the military service.¹¹⁵ In essence, the only real discrepancy between the practical application of the established rules governing probable cause in federal practice and the military practice was the commanding officer authorized search.

B. THE NEW REQUIREMENT

The case of *United States v. Brown*¹¹⁶ was to bring about a complete change in the concept of the commanding officer's authority to order searches under paragraph 152 of the Manual as established in preceding cases. Private Brown and nine other

¹⁰⁸ See NCM 58-00130, Hillan, 26 C.M.R. 771 (1958).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 796 (emphasis by the Court).

¹¹¹ "See ACM 4957, Thomas, 4 C.M.R. 729, *pet. denied*, 2 U.S.C.M.A. 663, 4 C.M.R. 173 (1952).

¹¹² See *United States v. Florence*, 1 U.S.C.M.A. 620, 5 C.M.R. 48 (1952); ACM 4351, Gosnell, 3 C.M.R. 646 (1952).

¹¹³ The *Uniform Code of Military Justice* art. 7(b) provides that: "Any person authorized under regulations governing the armed forces to apprehend persons subject to this chapter or to trial thereunder may do so upon reasonable belief that an offense has been committed and that the person apprehended committed it." "Reasonable belief," as used here, is the equivalent of "probable cause." See ACM 15962, Williams, 28 C.M.R. 736 (1959).
"See ACM 8212, Cascio, 16 C.M.R. 799 (1954), *pet. denied*, 5 U.S.C.M.A. 847, 18 C.M.R. 333 (1955).

¹¹⁵ See *United States v. Rhodes*, 3 U.S.C.M.A. 73, 11 C.M.R. 73 (1953); CM 388049, Polin, 21 C.M.R. 352, *pet. denied*, 7 U.S.C.M.A. 765, 21 C.M.R. 340 (1956).

¹¹⁶ 10 U.S.C.M.A. 482, 28 C.M.R. 48 (1959).

39 MILITARY LAW REVIEW

soldiers were allowed to leave their military compound in Korea to go on pass. They boarded a truck provided them and departed. Six or seven of the ten soldiers had been suspected for several months of using narcotics. While the soldiers were on pass, Brown's commanding officer received information that one of the soldiers had borrowed ten dollars before departing. This apparently led the commanding officer to believe that the soldier who had borrowed money would spend it on narcotics and return with the narcotics in his possession. Upon their return, the commander conducted a search of all and found Brown in possession of narcotics. In holding that the narcotics were inadmissible at Brown's court-martial as the product of an illegal search and seizure, Judge Ferguson, with Chief Judge Quinn concurring, declared that:

While there is substantial discretion vested in the commanding officer to order a search of persons and property under his command, consideration of all the circumstances herein make it clear beyond cavil that Lieutenant Clark acted on nothing more than mere suspicion. Reasonable or probable cause was clearly lacking for both the apprehension and the search and, although the military permits certain deviations from civilian practice in the procedure for initiating a search, the substantive rights of the individual and the necessity that probable cause exist therefor remain the same. Unreasonable searches and seizures will not be tolerated.”.

With this brief language the Court, without commenting on the traditional authority of a commanding officer to authorize a search without establishing he had probable cause to do so, extended the probable cause requirement to all searches, including those of the commanding officer.¹¹⁸ The Court's mandate that it would not tolerate unreasonable searches and seizures seems unnecessary, as it previously had applied the federal practice in determining the reasonableness of military searches. It had not, however, extended the requirement of probable cause to the commanding officer. Continuing, the Court stated:

While we recognize the commanding officer's traditional authority to conduct a search in order to safeguard the security of his command, that issue is not presented here.

... The search was general and exploratory and wholly lacking in probable cause.

Based upon the Court's language, we might wonder under what

¹¹⁷ *Id.* at 488-89, 28 C.M.R. 54-55 (footnotes omitted).

¹¹⁸ See Judge Latimer's dissent, *id.* at 489, 28 C.M.R. at 55.

¹¹⁹ *Id.* at 489. 28 C.M.R. at 55.

MILITARY SEARCH AND SEIZURE

circumstances a commanding officer's search would be considered to be for the purpose of safeguarding the security of his command. Judge Latimer, dissenting, also failed to follow the majority's logic:

Not only do I believe he acted within reason, but I am of the opinion he would have failed in his duties to his command if he had not taken some affirmative action to prevent the importation of habit-forming drugs into his area. . . .

. . . .
. . . Habit forming drugs are ruinous to men and fatal to military organization.'"

It would have been desirable for the Court to have delineated what it considered within the scope of the commanding officer's traditional authority, but this it did not do. It is further confusing to find the search termed "general." A general search, in the federal practice, is one made without arrest and without warrant (authority of the commanding officer).¹²¹ By the Court's own admission, there was both authority and an arrest. True enough, the search may have been exploratory, which affects the question of its ultimate "reasonableness," but that is an issue quite apart from the necessity of probable cause or the existence of probable cause where such is a prerequisite for the search.

Be that as it may, any disagreement with the Court's decision cannot detract from the net effect of eliminating to a great extent the traditional authority of the commanding officer to search and imposing a new requirement that a commanding officer have probable cause prior to authorizing or conducting a search of persons and property under his jurisdiction.

C. *QUANTUM EXPLORED — THE COMMANDING OFFICER AUTHORIZED SEARCH*

The duty of a commanding officer in determining whether or not to search, or to authorize others to search, members of his command is not understood generally by commanders. More than a lack of understanding prevails, as many commanders consider restrictions upon their authority to search as stumbling blocks in the path to the proper exercise of command. The exercise of command and the soldier's rights of privacy are then the equities to be weighed, and the weighing of the equities rests upon that same commander, subject to judicial review. The commander now stands in the place of the federal magistrate issuing a search

¹²⁰ *Id.* at 493-94, 28 C.M.R. at 59-60.

¹²¹ *See* Taylor v. United States, 286 U.S. 1 (1932).

39 MILITARY LAW REVIEW

warrant, and he must be at least as well-informed as his federal counterpart.¹²² His being informed does not, of course, mean legally or professionally informed, but is in reference to the quantum of information he must possess in order to authorize or conduct a search. In the role of "military magistrate," he must assume the responsibility of tempering his decisions with impartiality,"³ while seeking to safeguard the security of his command.

Probable cause must be determined not only in light of the probabilities of an offense having been committed, but there must be probable cause for the action actually taken.¹²⁴ The subject matter of the search must be identified, and the request for permission to search must contain, at least in general terms, a description of the class or classes of property sought.¹²⁵ Even though the requisite probable cause to search has been shown, the authorization to search cannot extend to an exploratory search for evidence but must define with reasonable specificity the things that properly may be seized."⁴ The search may be authorized only for contraband or the fruits or instrumentalities of the crime. An authorization to search for mere evidence would be illegal, though based on probable cause.¹²⁷

Therefore, in any decision to order a search the commander must (1) know his jurisdiction to authorize searches, (2) determine that probable cause exists to search, and (3) identify the subject matter of the search. The particularization of the subject matter of a search may appear to be separate from the issue of probable cause, but the commander must have probable cause to believe that a class or classes of seizable items will be found upon search. The requirement must be met at the same time as probable cause and is really the ultimate purpose of probable cause.

In any military determination of probable cause, a full knowledge of the federal rules and standards is mandatory. Not only has it been recognized that the test for the existence of probable

¹²² *United States v. Hartsook*, 15 U.S.C.M.A. 291, 35 C.M.R. 263 (1965).

¹²³ The purpose of the warrant procedure was described in *Wong Sun v. United States*, 371 U.S. 471, 481-82 (1963), in the following language: "The arrest warrant procedure serves to insure that the deliberate, impartial judgment of a judicial officer will be interposed between the citizen and the police, to assess the weight and credibility of the information which the complaining officer adduces as probable cause."

¹²⁴ *See United States v. Thomas*, 16 U.S.C.M.A. 306, 36 C.M.R. 462 (1966).

¹²⁵ *United States v. Hartsook*, 15 U.S.C.M.A. 291, 35 C.M.R. 263 (1965).

¹²⁶ *See United States v. Penman*, 16 U.S.C.M.A. 67, 36 C.M.R. 223 (1966).

¹²⁷ *United States v. Martinez*, 16 U.S.C.M.A. 40, 36 C.M.R. 196 (1966); *United States v. Battista*, 14 U.S.C.M.A. 70, 33 C.M.R. 282 (1963). *See also*, Davis, *The "Mere Evidence" Rule in Search and Seizure*, 35 MIL. L. REV. 101 (1967).

cause is the same¹²⁸ in the military law as in civilian practice,¹²⁹ but a look at the rules developed in military cases reveals a striking similarity in terminology and results. In looking for the basic concepts involving probable cause, one finds that probable cause in the military exists if the facts and circumstances justify a prudent man in concluding that an offense has been or is being committed¹³⁰ and that these circumstances are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.¹³¹ On occasion the Court also has combined the separate questions of probable cause and reasonableness into an indistinguishable issue and resolved it on the basis of the "total atmosphere" of the case.¹³² It is apparent that, where evidence obtained as the result of a search is challenged by the accused, the government must show the justification for the search.¹³³ This includes both probable cause and a description of the items to be seized, properly conveyed to the authorizing officer.¹³⁴

In finding the necessary probable cause for a search, the question is not merely one of the quantum of evidence available, but when a search is made upon the authority of a commanding officer, it must be shown that he granted the authorization with knowledge communicated to him sufficient to show probable cause for the search.¹³⁵ The commanding officer's authorizing a search by military investigators creates some problems. The commanding officer may not rely on the statement of the investigators that cause exists for a search,¹³⁶ but he must inquire into the source of the investigators' information and belief and elicit any corroboration for his belief that the information is accurate.¹³⁷ In *United States v. Davenport*,¹³⁸ the OSI received a tip that Davenport had possession of hunting knives that previously had been

¹²⁸ See ACM S-20491, *Maginley*, 32 C.M.R. 842 (1962), *affd*, 13 U.S.C.M.A. 445, 32 C.M.R. 445 (1963); ACM 13959, *Rhodes*, 24 C.M.R. 776 (1957).

¹²⁹ The use of the terms "civilian practice" and "federal practice" as being interchangeable is correct in view of the requirement that state courts must use federal fact-finding procedures in determining the reasonableness and constitutionality of searches and seizures. See *Ker v. California*, 374 U.S. 23 (1963).

¹³⁰ *United States v. Ness*, 13 U.S.C.M.A. 18, 32 C.M.R. 18 (1962).

¹³¹ *United States v. Thomas*, 16 U.S.C.M.A. 306, 36 C.M.R. 462 (1966).

¹³² See *United States v. Conlon*, 14 U.S.C.M.A. 84, 33 C.M.R. 296 (1963).

¹³³ See ACM 18977, *Massingale*, 35 C.M.R. 768 (1964).

¹³⁴ See *United States v. Hartsook*, 15 U.S.C.M.A. 291, 35 C.M.R. 263 (1965).

¹³⁵ See *United States v. Martinez*, 16 U.S.C.M.A. 40, 36 C.M.R. 196 (1966).

¹³⁶ See *United States v. Westmore*, 14 U.S.C.M.A. 474, 34 C.M.R. 254 (1964).

¹³⁷ See *United States v. Davenport*, 14 U.S.C.M.A. 152, 33 C.M.R. 364 (1963).

¹³⁸ *Id.*

39 MILITARY LAW REVIEW

reported stolen. The OSI told the commander only that Davenport was involved. It was held that, although there may have been probable cause in abundance, the source of the information and the necessary corroboration were not communicated to the proper authority for the determination of probable cause.

Not only must the commander inquire sufficiently into the facts available, he must take care not to rely upon mere suspicion, even when the suspicion is that of an official investigating agency.¹³⁹ Generally, common rumor or report, suspicion, or even strong reason to suspect is held insufficient to show probable cause to search.¹⁴⁰ For example, the fact that an accused met the general physical description of the assailant in an attempted rape was insufficient to provide probable cause.¹⁴¹ An example of strong suspicion is found in *United States v. Penman*.¹⁴² State officers raided a party (off post) where narcotics were being used. Marihuana was found on two of the persons present. Information was also received to the effect that Penman had left the party only fifteen minutes before the raid. All of this information was communicated to the executive officer of Penman's unit, who ordered a search. In holding the results of the search inadmissible as the product of a search not founded on probable cause, the Court could find only mere belief or suspicion. The Court pointed out that there was no indication that Penman was in possession of or was using marihuana at the party, nor was any indication given as to the reliability of the source of the information.¹⁴³

Although suspicions are often confirmed by a search, it goes almost without comment that the legality of a search may not be based upon evidence discovered as a result thereof.¹⁴⁴ Also, as might be expected, probable cause cannot be based upon information obtained as the result of a prior illegal search.¹⁴⁵ However, a prior illegal search does not necessarily render the subject matter

¹³⁹ See ACM S-20788, Bowser, 33 C.M.R. 703 (1963).

¹⁴⁰ "Id.; see also *United States v. Martinez*, 16 U.S.C.M.A. 40, 36 C.M.R. 196 (1966).

¹⁴¹ CM 409442, Johnson, 33 C.M.R. 547, *pet. denied*, 14 U.S.C.M.A. 680, 33 C.M.R. 436 (1963).

¹⁴² 16 U.S.C.M.A. 67, 36 C.M.R. 223 (1966).

¹⁴³ It is submitted that to require inquiry into the veracity of a state officer's report is an unwarranted extension of the role of corroboration. This case would appear to be a situation for the application of the "built-in credibility" and "total atmosphere" tests. See *United States v. Herberg*, 15 U.S.C.M.A. 247, 35 C.M.R. 219 (1965); *United States v. Conlon*, 14 U.S.C.M.A. 84, 33 C.M.R. 296 (1963).

¹⁴⁴ ACM S-20788, Bowser, 33 C.M.R. 703 (1963); ACM S-19729, Jones, 31 C.M.R. 540 (1961).

¹⁴⁵ "United States v. Gebhart, 10 U.S.C.M.A. 606, 28 C.M.R. 172 (1959).

MILITARY SEARCH AND SEIZURE

forever immune from seizure. There may be information untainted by the prior illegal search which may be used to provide probable cause.¹⁴⁶ In *United States v. Ball*,¹⁴⁷ a prior illegal search was conducted by military agents. The search confirmed their suspicions, and they subsequently arrested the accused. The search and seizure incident to the arrest was upheld on the basis that if the goods seized were not a product of the illegal search but were independently seizable, then they are admissible. There was probable cause to arrest the accused prior to the illegal search—without the information provided by the illegal search—and the arrest, being based on untainted probable cause, supported the incidental search. A statement taken in violation of article 31, *Uniform Code of Military Justice*, or in violation of the accused's constitutional privilege against self-incrimination is treated much the same as a prior illegal search. Any such statement may not be used as information providing or supporting probable cause.¹⁴⁸

Separating for a moment the seizure from the search, military courts have adopted the federal practice of recognizing "open view" seizures. In the military, there is a right to seize contraband property in open view. In *United States v. Bolling*,¹⁴⁹ the stated requirements were (1) contraband (possession presumed unlawful), (2) which can be easily concealed or removed, (3) located in a common place or area clearly visible to anyone who happens to look. *United States v. Burnside*¹⁵⁰ extended the open view concept beyond contraband. Civilian police, having knowledge of a larceny of electrical cable from an Air Force base, went to the accused's residence to inquire about a possible misuse of license plates on his car. In trying to locate the accused, they glanced into the backyard of his rented home and there noticed electrical cable of the type reported stolen. The Court held that public officers properly on private property do not violate the fourth amendment if, without a warrant, they seize contraband or the fruits of a crime which are in plain view. The personal knowledge that an offense had been committed, plus finding the fruits in open view, resulted in a legal seizure.¹⁵¹ Although such cases should be rare, this reasoning should apply equally to any military

¹⁴⁶ See *United States v. Justice*, 13 U.S.C.M.A. 31, 32 C.M.R. 31 (1962).

¹⁴⁷ 8 U.S.C.M.A. 25, 23 C.M.R. 249 (1957).

¹⁴⁸ *United States v. Haynes*, 9 U.S.C.M.A. 792, 27 C.M.R. 60 (1958).

¹⁴⁹ 10 U.S.C.M.A. 82, 27 C.M.R. 156 (1958).

¹⁵⁰ 15 U.S.C.M.A. 326, 35 C.M.R. 298 (1965).

¹⁵¹ *Id.* The only question presented is the legality of the seizure, as there is no search in the constitutional sense.

39 MILITARY LAW REVIEW

agent or officer who has knowledge of an offense and happens to find the fruits of the offense in open view.

Barracks larcenies not only create morale problems in the military but are very difficult to solve. However, the seldom mentioned "method of operation" concept of establishing probable cause for searches aimed at prior larcenies shows some promise in this area. The issue was raised in *United States v. Martinez*,¹⁵² when a larceny victim awoke to find Martinez going through his clothes. The victim gave chase and caught Martinez. The OSI informed the accused's commander of these facts, and, based on a personal knowledge of three similar larcenies in the same area in one month, the commander ordered a search of Martinez's wall and footlocker for the fruits of the three other offenses. The importance of the Court's holding is in its language giving credence to the use of *modus operandi* to establish probable cause:

Similarity in the method of operation indicates with a fair degree of probability that the person who committed one offense committed the others. [citations omitted] The probability is increased when all the offenses are perpetrated within the same area and in a relatively brief period of time.'

Any use of the "method of operation" concept to show probable cause for prior larcenies faces problems other than a possible failure of sufficient probable cause. The number of larcenies concerned and the time that may have elapsed could create additional problems of particularization of the subject matter of the search.¹⁵⁴

The "freshness" of the information presented—that is, the facts and circumstances being so closely related to the time the search was authorized as to justify a finding of probable cause at that time¹⁵⁵—is not always a negative factor. It is generally true that the time of the observation of the events is of some importance in determining the sufficiency of probable cause.¹⁵⁶ However, other cases show time to be of the essence only where there is delay between the time the government becomes aware of the information and when the authority to search is sought. In such an instance, the date the informant obtained his informa-

¹⁵² 16 U.S.C.M.A. 40, 36 C.M.R. 196 (1966).

"*Id.* at 42, 36 C.M.R. at 198.

¹⁵⁴ See *United States v. Martinez*, 16 U.S.C.M.A. 40, 36 C.M.R. 196 (1966).

¹⁵⁵ See ACM S-20491, Maginley, 32 C.M.R. 842 (1962), *aff'd*, 13 U.S.C.M.A. 445, 32 C.M.R. 445 (1963). This position is similar to that accepted in the federal practice. See, e.g., *Lowrey v. United States*, 161 F.2d 30 (8th Cir. 1947); *Hefferman v. United States*, 50 F.2d 554 (3d Cir. 1931).

¹⁵⁶ See ACM S-20491, Maginley, 32 C.M.R. 842, *aff'd*, 13 U.S.C.M.A. 445, 32 C.M.R. 445 (1961).

MILITARY SEARCH AND SEIZURE

tion may be of little consequence.¹⁵⁷ On the positive side, the freshness of the information may lend the information additional credibility and weight. In *United States v. Drew*,¹⁵⁸ there had been a number of larcenies in barracks #234 over a period of 45 days. When several men were transferred from barracks #234 to barracks #132, the larcenies stopped in the former and began in the latter. A report of a larceny on a Saturday resulted in a search on the following Monday. In upholding the “reasonableness” of the search, the Court believed it reasonable to search the barracks for the articles so *recently* the object of a larceny. The lesson to be learned here may well be that the combination of relatively minor factors (here, method of operation and fresh evidence), each perhaps individually inadequate to provide probable cause, may be combined so as to reach the magical quantum required.

It has been suggested that a great many problems would be solved in the difficult and tedious task of determining probable cause and specificity of items to be seized if the military would initiate a uniform system of written authorizations to search similar to a civilian warrant.¹⁵⁹ The United States Court of Military Appeals has expressed its desire very recently in rather blunt language :

[T]he task of decision in a case such as this would be simplified if the authority to search was in writing. The writing itself would spell out the facts upon which the authorization is based, and it would also enumerate the articles to be seized. There would be, therefore, no necessity for extensive testimony. . . .¹⁶⁰

We very strongly recommend that the civilian practice be adopted throughout the military.””

Such a suggestion is certainly a step in the right direction. However, extreme caution would be necessary to insure that a commanding officer would not be penalized for his lack of skill in drafting “legal” documents. The daily association of the people involved and the resulting wealth of information known by a commanding officer about his personnel should not be excluded as

”See ACM 18074, Kauffman, 33 C.M.R. 748, *aff’d in part, rev’d in part*, 14 U.S.C.M.A. 283, 34 C.M.R. 63 (1963).

¹⁵⁸ 15 U.S.C.M.A. 449, 35 C.M.R. 421 (1965).

¹⁵⁹ See Webb, *Military Searches and Seizures—The Development of a Constitutional Right*, 26 *MIL. L. REV.* 1, 77 (1964).

”United States v. Martinez, 16 U.S.C.M.A. 40, 42, 36 C.M.R. 196, 198 (1966).

¹⁶¹ *United States v. Penman*, 16 U.S.C.M.A. 67, 69, 36 C.M.R. 223, 225 (1966).

39 MILITARY LAW REVIEW

a method of bolstering the written authorization showing probable cause and specificity. Any resort to the federal rule excluding oral testimony on the issue of probable cause and limiting the inquiry to the "warrant" alone¹⁶² would result in unjust decisions and unduly burden the unprofessional "military magistrate."

While the military appellate agencies generally have applied federal standards to searches and seizures in the military, there are some cases not found wanting for lack of probable cause that appear to fall short of the established requirements in federal practice. In *United States v. Murray*,¹⁶³ a commanding officer found mail addressed to APO 172 (serving his unit) in a trash can. Knowing the accused had access to the mail room because he was in charge of breaking down the mail directed to that address, the commander searched the accused's quarters and found more mail addressed to other people. By all the rules thus far established, the finding of the mail in the trash can and the accused's access (among others) to the mail would not appear to amount to more than mere suspicion, or at best a possibility of guilt. However, the Court found that "[t]here is no doubt that Mullahey had *probable cause to suspect* the accused of committing a mail offense. . . , [H]e was almost compelled to infer that mail matter was being wrongfully used and that the accused was probably the criminal agent involved."¹⁶⁴ (Emphasis added.)

Another somewhat similar case is *United States v. Summers*.¹⁶⁵ An MP duty officer and his driver were on patrol at Fort Carson, Colorado. Both were aware of several reported post exchange and weapons larcenies. At 0130 hours they observed a car with two people parked behind the post exchange. As the duty officer checked identification, the driver used his flashlight to look around the inside of the car and discovered a caliber .45 weapon. The seizure of the weapon ultimately led to conviction on both

¹⁶² See *Giordenello v. United States*, 357 U.S. 480 (1958); *United States v. Freeman*, 165 F. Supp. 121 (S.D. Ind. 1958). Judge Kilday's language in *United States v. Penman*, 16 U.S.C.M.A. 67, 75, 36 C.M.R. 223, 231 (1966), may be a forewarning of the possibility of the United States Court of Military Appeals following the narrow federal rule: "While the civilian courts generally confine themselves to consideration of the warrant and the accompanying affidavit, *in the absence of such documents* we have gone farther and considered the record as a whole." (emphasis added)

¹ 12 U.S.C.M.A. 434, 31 C.M.R. 20 (1961).

"*Id.* at 437, 31 C.M.R. at 23. For authorities holding various degrees of suspicion to be short of probable cause, see notes 139-142 *supra* and accompanying text.

"13 U.S.C.M.A. 573, 33 C.M.R. 105 (1963).

MILITARY SEARCH AND SEIZURE

the post exchange and arms larcenies. Once again, the question is: What probable cause did the driver have to search the car? The accused were not committing an illegal act, nor were they under arrest. At best, their being at that location at that time of night was suspicious and could hardly provide probable cause that they had committed either of the known offenses. However, the Court found that, under the circumstances, flashing a light around the interior of the car would be the most natural and reasonable thing to do. Although the language was not used, one can see the logic of the driver's actions being "compelled by the circumstances."

This concept must be considered as having reached its ultimate in *United States v. Schafer*.¹⁶⁶ A bloody and nearly nude body was found on an Air Force base, the only clue to what happened being a trail of blood leading toward an area consisting of twenty barracks, three mess halls, and two other buildings. A search of the entire area was authorized by the base commander. As a result of this search, incriminating evidence was found, and Schafer was apprehended and ultimately convicted of murder. The logical conclusion would seem to be that there was a complete absence of probable cause to believe that Schafer was the criminal agent or that he would be in possession of the fruits or instrumentalities of the crime. Even more obvious is that the authorization to search in no way specified the items subject to seizure. A more obvious exploratory search would be hard to imagine. But, once again the overall "reasonableness" of the search was upheld on the reasoning that:

Here the action taken was not based on bare suspicion, but was virtually compelled by the circumstances. Clearly a grave crime had been committed, and from the location of the body, the clothing that was recovered, and the blood spots, it was reasonable to conclude leads might be developed in the "26th area." Thus the scope of the search was not unduly broad; although it was somewhat generalized, it was not unreasonable under the circumstances. The factors available to the commander's consideration fairly dictated a search of the area embraced in the authorization."¹⁶⁷

The reasoning of the court, though most acceptable, is difficult to understand in view of prior decisions.

But perhaps it is possible to find distinguishing features between the three cited cases and those in apparent conflict. Accepting, for the moment, the premises as presented herein—that

¹⁶⁶ 13 U.S.C.M.A. 83, 32 C.M.R. 82 (1962)

¹⁶⁷ *Id.* at 87, 32 C.M.R. at 87.

39 MILITARY LAW REVIEW

probable cause is a dual requirement (*i.e.*, probable cause to believe that a crime has been or is being committed, and probable cause to believe that criminal goods will be found on the person or at the place to be searched)—the former may be of greater importance than the latter in determining “total probable cause” and overall “reasonableness.” In the three cases just discussed, there can be no doubt that crimes had been committed; the only doubt remaining was the identity of the criminal agent. The underlying principle may be that: *Proof positive of the commission of an offense reduces the quantum of probable cause necessary to **show** criminal agency or the probability of finding specified fruits and instrumentalities at the location to **be** searched.*

Continuing, it may be noted that *Murray* and *Summers* dealt with government property and relatively serious offenses, and *Schafer* was the most heinous of crimes—murder. Will the strict standards of probable cause be relaxed when serious offenses are involved within the area of a command or where the commander’s responsibility toward government property is in issue? The second underlying principle may be that: *The nature and gravity of the offense under investigation may affect the quantum of information needed to provide probable cause and specificity for the search.*¹⁶⁸

The problem of probable cause to establish the agency of the accused and specificity are often found lacking in what are termed “general, exploratory” searches, which of course will not be tolerated. Exploratory, and therefore necessarily unreasonable, searches may be founded properly on probable cause to believe an offense has been committed and yet be struck down as exploratory for a failure to specify the persons or places to be searched and the items to be seized. But it is possible that not all searches that are somewhat exploratory in nature are necessarily unreasonable. In *Schafer*, there was hardly a suspicion as to what would be found or who would have it. The third underlying principle may be that: *Where the circumstances of the*

¹⁶⁸ This proposition cannot be supported well from direct language of the cases. However, the often unwritten sentiment is expressed by Mr. Justice Jackson in his concurring opinion in *McDonald v. United States*, 335 U.S. 451, 459–60 (1948): “While I should be human enough to apply the letter of the law with some indulgence to officers acting to deal with threats or crimes of violence which endanger human life or security, it is notable that few of the searches found by this Court to be unlawful dealt with that category of crime. Almost without exception, the overzeal was in suppressing acts not *malum in se* but only *malum prohibitum*.”

MILITARY SEARCH AND SEIZURE

situation compel action in the nature of a search, additional circumstances may compel the authorization of a search that is general in scope. This latter principle, and its application, becomes of primary importance in the area of shakedown searches.

D. HEARSAY IN THE MILITARY PRACTICE

Although the informant is probably not nearly so important to law enforcement in the military community as he is in the civilian community, because of the relative absence of organized crime, probable cause based on hearsay information is quite common in the military. Hearsay information may be considered in the military practice on the determination of probable cause for the issuance of a **warrant**,¹⁶⁹ for an **arrest**,¹⁷⁰ or for a search authorized by a commanding officer.¹⁷¹ There is in the military the same requirement as in federal practice that the hearsay information be corroborated. This may be done either by establishing the credibility of the hearsay **declarant**,¹⁷² or by corroboration of the facts provided by the hearsay **declarant**.¹⁷³ The surest way of establishing the credibility of hearsay information is to have a reliable informant and to corroborate as much of the information as possible, for a combination of the two means of corroboration will always result in **reliability**.¹⁷⁴

Presumably the military would find that information provided by a single informant previously proved reliable would establish probable cause, as this is the federal practice. However, there are no cases directly in point.¹⁷⁵ Further, there would seem to be no requirement of proving reliability where the information is provided not by an informant but by an ordinary citizen,¹⁷⁶ an ordinary citizen in this sense being an ordinary soldier. By the same reasoning, the victim of an offense and the complaint he registers should not require the same corroboration or verification as would the hearsay declaration of an informer to serve as

¹⁶⁹ See ACM 18074, Kauffman, 33 C.M.R. 748, *aff'd in part, redd in part*, 14 U.S.C.M.A. 283, 34 C.M.R. 63 (1963).

¹⁷⁰ See United States v. Herberg, 15 U.S.C.M.A. 247, 35 C.M.R. 219 (1965).

¹⁷¹ See United States v. Davenport, 14 U.S.C.M.A. 152, 33 C.M.R. 364 (1963).

¹⁷² See United States v. Ness, 13 U.S.C.M.A. 18, 32 C.M.R. 18 (1962).

¹⁷³ See United States v. Cuthbert, 11 U.S.C.M.A. 272, 29 C.M.R. 88 (1960).

¹⁷⁴ See United States v. Ness, 13 U.S.C.M.A. 18, 32 C.M.R. 18 (1962).

¹⁷⁵ The language of United States v. Penman, 16 U.S.C.M.A. 67, 36 C.M.R. 223 (1966), would seem to indicate that, had the reliability of the information been *communicated* to the commander, probable cause would have been established.

¹⁷⁶ United States v. Davenport, 14 U.S.C.M.A. 152, 33 C.M.R. 364 (1963) (dissenting opinion).

probable cause.¹⁷⁷ It may also be proper to argue that, if a hearsay declarant who provided probable cause is available as a witness at trial, his *prior* credibility may be supported by direct and cross-examination.¹⁷⁸ This certainly would appear to eliminate any fear of the nonexistent informer and could be used to test the commander's wisdom in relying on him. Although the government generally is not required to disclose the identity of the informant unless such disclosures would be necessary in establishing an affirmative defense, such as entrapment,¹⁷⁹ Judge Ferguson would require disclosure in every case, fearing the creation of a nonexistent informer to provide probable cause subsequent to the search.¹⁸⁰

VI. SHAKEDOWN—SEARCH OR INSPECTION?

A. *GEA'ERAL*

The military rules of search and seizure, as simplified, are: probable cause, communicated to the commander, authorizing a search for specified items subject to seizure in a specified area. The so-called "fishing expedition," or exploratory search, is prohibited.¹⁸¹ The necessary implication is that a commanding officer not only must know with a reasonable degree of probability that an offense has been committed, but he must know in general terms what items are to be searched for and where they are expected to be found. The additional requirements are the specificity of items subject to seizure and the specificity of the area to be searched. The development of rules, however, dictates the subsequent development of exceptions. The *Schafer* case¹⁸² clearly lacked both specificity requirements, and yet the search was found to be compelled by the circumstances. The most common situation giving rise to problems of exploratory searches is the shakedown search.

B. *THE SHAKEDOWN SEARCH*

Necessity frequently dictates the search of an area containing several persons and their property, rather than the search of a

¹⁷⁷ See *United States v. Herberg*, 15 U.S.C.M.A. 247, 35 C.M.R. 219 (1965).

¹⁷⁸ See *id.*; *United States v. Cuthbert*, 11 U.S.C.M.A. 272, 29 C.M.R. 88 (1960).

¹⁷⁹ See *United States v. Ness*, 13 U.S.C.M.A. 18, 32 C.M.R. 18 (1962).

¹⁸⁰ *Id.* at 25, 32 C.M.R. at 25 (dissenting opinion).

¹⁸¹ See *United States v. Brown*, 10 U.S.C.M.A. 482, 28 C.M.R. 48 (1959).

¹⁸² *United States v. Schafer*, 13 U.S.C.M.A. 83, 32 C.M.R. 83 (1962), discussed in Part V.C. *supra*.

MILITARY SEARCH AND SEIZURE

single individual and his property. This procedure, termed a “shakedown search,” is employed most often in the case of barracks larceny, where there is cause to believe that the thief is a member of the barracks. Prior to *Brown*,¹⁸³ a search authorized by a commanding officer required no showing of probable cause, but a search conducted without the commanding officer’s authority was required to be founded on probable cause.¹⁸⁴ The problem inherent in any shakedown search was the lack of specificity of the area to be searched, and they were often condemned as being “blanket,” and “general, exploratory,” searches.¹⁸⁵ However, shakedown searches, if based on probable cause, were often held to be reasonable. In *United States v. Harmon*,¹⁸⁶ a member of a replacement detachment awoke to find \$31.00 missing. The barracks was secured, and at 0600 hours an unsuccessful shakedown search was conducted. At 0900 hours another search of the barracks was conducted, and the money was found in the accused’s shirt pocket. Judge Latimer, speaking for the majority, found that the probability of the money being in the possession of an occupant of the barracks, together with the fact that most of the personnel were soon to depart, provided the necessary probable cause to search *all* of the occupants to prevent the removal of the stolen money. (Probable cause for an exploratory search?) Judge Latimer found the situation to be “nothing more or less than a familiar ‘shakedown’ inspection.”¹⁸⁷ Chief Judge Quinn, concurring, and Judge Ferguson, dissenting, both categorized the shakedown as a search, not an inspection.¹⁸⁸ CM 408316, *Vick*,¹⁸⁹ found probable cause for a shakedown search of five men in a barracks—all present when the larceny was committed—and recognized probable cause to be a necessary prerequisite for the search. *United States v. Drew*¹⁹⁰ also involved a shakedown search. After finding the requisite probable cause not just for a search but for an exploratory search of the barracks, the Court

¹⁸³ *United States v. Brown*, 10 U.S.C.M.A. 482, 28 C.M.R. 48 (1959), discussed in Part V.B. *supra*.

¹⁸⁴ See *United States v. Swanson*, 3 U.S.C.M.A. 671, 14 C.M.R. 89 (1954).

¹⁸⁵ See CM 389786, *Washington*, 22 C.M.R. 346 (1956); CM 366752, *Davis*, 13 C.M.R. 480 (1953), *rev’d on other grounds*, 4 U.S.C.M.A. 577, 16 C.M.R. 151 (1954).

¹⁸⁶ 12 U.S.C.M.A. 180, 30 C.M.R. 180 (1961).

¹⁸⁷ *Id.* at 183, 30 C.M.R. at 183.

¹⁸⁸ For additional cases indicating a similar conflict in terminology, see, *e.g.*, *United States v. Gebhart*, 10 U.S.C.M.A. 606, 28 C.M.R. 172 (1959); *United States v. Swanson*, 3 U.S.C.M.A. 671, 14 C.M.R. 89 (1954).

¹⁸⁹ 33 C.M.R. 439 (1962).

¹⁹⁰ 15 U.S.C.M.A. 449, 35 C.M.R. 421 (1965).

39 MILITARY LAW REVIEW

observed that the commanding officer's awareness of the items to be sought had met the specificity of subject matter requirement. More importantly, the Court approved the search of an area when circumstances render such necessary. The point to be made is that a search and an inspection are not the same. A shakedown search is nothing more or less than a search, with all the constitutional requirements of prerequisite probable cause and reasonableness inherent in any search, only it may be somewhat broader in scope than an ordinary search.

C. THE SHAKEDOWN INSPECTION

The distinction to be drawn between shakedown search and shakedown inspection would not be difficult if the "shakedown" prefix could be eliminated. A search necessarily implies a quest for items related to an offense. Without presupposing a crime, there is no need to search. On the other hand, an inspection does not presuppose a criminal offense but, in the military sense, is designed to insure preparedness, orderliness, and cleanliness in the normal course of regulated military operations. The "legality" of most military inspections is never questioned, because they are not for the purpose of ferreting out evidence of crime and do not produce items that are offered as evidence in a criminal trial. But of course an inspection may well result in the discovery of items related to an offense, known or unknown. In CM 407463, *Coleman*,¹⁹¹ an electric razor was reported missing by one occupant of a trainee barracks. A shakedown search was conducted with negative results. Later, after the trainees had vacated the barracks, a sergeant in the regular performance of his assigned duties was inspecting the barracks for orderliness and cleanliness. Upon opening the accused's footlocker, he discovered the stolen razor. The razor was held admissible over objection. The inspection, having been conducted for purely military purposes and with no purpose in mind to seek out or locate specific items of stolen property, was held not to be a search entitled to the protection of the fourth amendment. The board of review considered the razor to be in "open view," even though the sergeant unlocked the accused's footlocker.

An inspection may not lead to a direct seizure of items, but it may provide other information. During a routine inspection for cleanliness, an Air Force NCO discovered stolen items in the two accused's room. He reported this to the squadron commander,

¹⁹¹ 32 C.M.R. 522, *pet. denied*, 32 C.M.R. 472 (1962).

MILITARY SEARCH AND SEIZURE

who authorized a search and seizure of the stolen items in the room. The result was that information obtained from an inspection provided the prerequisite probable cause for a subsequent search and seizure. The Air Force board of review recognized that the inspection was not a search, as there was no suspicion preceding the observations made.¹⁹²

D. DECISION — SEARCH OR INSPECT?

The federal practice has developed rules to enforce strictly the requirements stated in the fourth amendment. As observed earlier, a search may be made incidental to an arrest, but the purpose for obtaining a warrant for arrest—or for an arrest without warrant—must withstand inquiry into the original motivation for the actions of the law enforcement officer. For, if an arrest is merely a pretext to search, there will be “bad faith” on the part of the arresting officer, and the search will be deemed unreasonable for avoiding the constitutional proscription requiring a warrant. The necessity of search must be evaluated by a magistrate empowered to issue a search warrant, unless the circumstances allow the exception—the incidental search.

The same fundamental rule of fairness prevails in the military practice. A search, and specifically a shakedown search, may be made where probable cause exists and its execution is “reasonable” under the circumstances. While it is necessary and proper to conduct inspections of military personnel and their property to insure that military standards of preparedness, cleanliness, and orderliness are maintained, the inspection must pass the test of motivation. In *United States v. Lange*,¹⁹³ the squadron commander told the administrative officer to conduct periodic shakedown inspections of the command. Some 17 days later, upon receiving a report of three wallets being stolen, the administrative officer ordered a “shakedown” which resulted in the discovery of the wallets in the accused’s possession. The introduction of the wallets into evidence was objected to on the basis that they were the product of an illegal search and seizure. The government claimed that the administrative officer was merely complying with his superior’s order to conduct periodic shakedown inspections. The United States Court of Military Appeals, Judge Kilday speaking for the Court, looked behind the alleged inspection and found a search, the true motivation for the action being the report of the larceny:

¹⁹² See ACM 19082, *Barker*, 35 C.M.R. 779 (1965).

¹⁹³ 15 U.S.C.M.A. 486, 35 C.M.R. 458 (1965).

39 MILITARY LAW REVIEW

However, an "inspection" cannot be used as a pretext to cover up unlawful invasions of the personal rights of members of the armed services. True it is that the administrative officer steadfastly maintained he was acting in good faith to comply with the commanding officer's order, and was not guilty of such an abuse. . . . His integrity and good faith, however, cannot change the character of what he actually did. It is clear . . . that what was conducted in the present case was in fact a search.¹⁹⁴

The Court refused to look beyond motivation and decided the case on a lack of authority on the part of the administrative officer to order a search of this type, not determining whether there was probable cause for the commander to order the search:

Regardless of whether he had the requisite probable cause to order this generalized search—a question with which we need not concern ourselves in the present case—there is no showing that the administrative officer was the senior officer present in the organization.”

Conversely, the position of the true inspection and its legitimacy in the event of discovery of "criminal" items was not harmed, but was in fact fortified and clarified:

We are not here concerned with an inspection that had been held earlier, and the wallets thereby recovered; or with an inspection that had been already scheduled at the time the administrative officer received the report of the larceny, where the situation conceivably would be different.”

The recognized necessity and reason for the military shake-down inspection has its counterpart in analogous situations in the civilian community.

E. CIVILIAN INSPECTIONS—AN ANALOGY

The military inspection, as well as any search, faces a dilemma in attempting to weigh the equities. While no one contests the apparent need for "in-ranks" inspections of troops, or their being inspected and tested for their aptitude in military skills, when an inspection cannot be directly related to their military preparedness but spills over into the area of individual privacy, the opposing interests are at hand.¹⁹⁷ The military commander

¹⁹⁴ *Id.* at 490, 35 C.M.R. at 462.

¹⁹⁵ *Id.* at 490, 35 C.M.R. at 462 (footnote omitted).

¹⁹⁶ *Id.*

¹⁹⁷ Civilian courts have recognized the necessity of such actions. The superior right of inspection was discussed in *United States v. Grisby*, 335 F.2d 652, 654 (4th Cir. 1964): "This is said to be an attribute of his military authority and essential to the maintenance of order and discipline. That is doubtless true in its many contexts. The sergeant who inspects the barracks neither seeks nor

MILITARY SEARCH AND SEIZURE

must recognize the necessity of maintaining orderliness and cleanliness, and yet he may sympathize with the resentment felt by the individual soldier whose sole source of privacy—his living quarters—are opened to the prying eyes of his superiors. He must not be made a second-class citizen, nor may his rights be tramped upon.¹⁹⁸ But, does the military inspection render the soldier a second-class citizen, or is he merely being subjected to treatment similar or analogous to that he would find in the civilian community under given circumstances?

The necessity for inspections in the civilian community is recognized in several areas, including customs and border inspections. Although the terms “search” and “inspection” are both used in describing customs and border inspections, the confusion of terms is not of great importance. One theory is that searches are allowed without probable cause because of inherent necessity :

No question of whether there is probable cause for a search exists when the search is incidental to the crossing of an international border, for there is reason and probable cause to search every person entering the United States from a foreign country, by reason of such entry alone.¹⁹⁹

Other cases²⁰⁰ allow “searches” at the border without probable cause, but another line of reasoning advanced is that these circumstances do not give rise to a search but are merely inspections to which the probable cause requirement of the fourth amendment does not apply.²⁰¹ *Haerr v. United States*²⁰² reasoned that a border inspection is not a search, in that “[a] search implies an examination of one’s premises or person with a view to the discovery of contraband or evidence of guilt to be used in prosecution of a criminal action. The term implies exploratory investigation or quest.”²⁰³ At the same time, it is apparent that situations giving rise to legitimate inspections will be tested for good faith, and if the motivation is search, the inspection term will not be allowed to be a pretext to search for contraband.²⁰⁴

obtains permission of the corporals and privates serving under him, and it would be a grave affront to military discipline if they undertook to exclude him.” (footnote omitted)

¹⁹⁸ *People v. Rodriguez*, 51 Cal. Rptr. 873 (1966).

¹⁹⁹ *Witt v. United States*, 287 F.2d 389, 391 (9th Cir. 1961).

²⁰⁰ *See, e.g., Marsh v. United States*, 344 F.2d 317 (5th Cir. 1965).

²⁰¹ *See United States v. Yee Ngee How*, 105 F. Supp. 517 (N.D. Cal. 1952), where the court used the term “search” in deciding a border inspection case but recognized that the fourth amendment did not apply.

²⁰² 240 F.2d 533 (5th Cir. 1957).

²⁰³ *Id.* at 535.

²⁰⁴ *See United States v. Hortze*, 179 F. Supp. 913, 917 (S.D. Cal. 1959):

39 MILITARY LAW REVIEW

It is hard to find a true factual analogy between the customs and border inspections and the military inspection. The person entering the United States does so voluntarily, knowing he is subject to inspection. Not so with the soldier who is conscripted into the military. However, there is one similarity which is inescapable: There are situations in both the military and civilian communities, by virtue of both nature and necessity, when the strict requirements of the fourth amendment must give way. This is with the full realization that the result well may be the seizure of contraband or fruits and instrumentalities of a crime which properly will be admissible in criminal actions, for:

If a search [inspection?] is valid there is nothing in the Fourth Amendment which inhibits the seizure by law enforcement agents of property, the possession of which is a crime, even though the officers are not aware that such property is on the person when the search is initiated."

The area of required public records is one example of civilian inspections wherein the fourth amendment is not applicable. Whether the reasoning behind the decisions is that the agents were lawfully on the premises,²⁰⁶ or is based on the theory of consent,²⁰⁷ or even that the subject matter is public and not private property,²⁰⁸ the more basic and substantive justification behind the result in each case is the recognition of the need for inspections.

The truest analogy to the military shakedown is in the health and safety inspection of private homes. If we are to exclude the shakedown inspection for the general purview of searches in general, then we must place the general motivation along the same lines—*i.e.*, the general welfare of the (military) community. In *Frank v. Maryland*,²⁰⁹ a sanitation inspector was directed to a residence on a complaint of rodents. Not finding anyone home, the inspector looked around the outside of the house and found straw mixed with rat feces amounting to nearly half a ton. Armed with this information, he later attempted to gain admittance to the Frank residence to inspect further, but he was

"[A]nd when inspector Hanks opened the Salem cigarette package, he did not expect to find an alien."

²⁰⁵ *United States v. Yee Ngee How*, 105 F. Supp. 517, 519 (N.D. Cal. 1952).

²⁰⁶ *See Zap v. United States*, 328 U.S. 624 (1946).

²⁰⁷ *See United States v. Pine Valley Poultry Distributors Corp.*, 187 F. Supp. 455 (S.D.N.Y. 1960).

²⁰⁸ *See Davis v. United States*, 328 U.S. 582 (1946).

²⁰⁹ 359 U.S. 360 (1959).

MILITARY SEARCH AND SEIZURE

refused. This refusal resulted in a \$20.00 fine. Mr. Justice Frankfurter, speaking for the United States Supreme Court, gave the Court's reasoning in refusing to extend the protections of the fourth amendment to this situation :

But giving the fullest scope to this constitutional right of privacy, its protection cannot here be invoked. The attempted inspection of the appellant's home is merely to determine whether conditions exist which the Baltimore Health code proscribes. . . . No evidence for criminal prosecution is sought to be seized. Appellant is simply directed to do what he could have been ordered to do without any inspection, and he cannot properly resist, namely, act in a manner consistent with the maintenance of minimum community standards of health and well-being, including his own.²⁰

With hardly changing a word, the entire quotation could be lifted from context and inserted into a case involving a military shake-down inspection. The right, the necessity, and the general welfare considerations are paramount and predetermine the reasonableness of the intended action.

Common knowledge within the military recognizes that shake-down inspections serve many purposes. While they certainly are to maintain the orderliness and cleanliness of the barracks, as well as to insure the preparedness of the individual soldier, another purpose is served by enforcing the regulatory proscriptions against certain forbidden items, such as weapons, ammunition, liquor, and others. Such items are either inherently dangerous in themselves or are of a nature to create a breakdown in military discipline by their presence. Ammunition is dangerous, not only to the person in possession of it, but also to those around him. Weapons are in the same category, but are perhaps more dangerous because of their inherent capability for turning a simple altercation into a catastrophe. The use of alcohol in a barracks is disruptive of discipline and, when coupled with access to weapons, increases the likelihood of serious offenses against the person. It may be said with some degree of certainty that the majority of a soldier's barracks mates would prefer to have the prohibition of such items strictly enforced. The point is simply that possession alone is bad enough, but the possibility of additional offenses being committed is increased greatly by the presence of such items. Therefore the commander must, for the protection of his personnel, enforce these regulatory proscriptions, not as a means of discovering crime but as a prophylactic measure.

²⁰ *Id.* at 366. See also, *Ohio ex rel. Eaton v. Price*, 364 U.S.263 (1960).

The discovery of these items may lead to punitive or non-punitive measures against the possessor, or it may result in nothing more than removal of the item from the barracks. There is, then, a "grey area" which neither fits a true search for evidence nor is a true inspection. This undecided area is not productive of appellate review, as infractions of the regulations are usually minor offenses. Even so, this grey area should not require any change in the recommended practice regarding searches and inspections. The prohibition of such items on the list of areas for inspection is not to ferret out evidence of criminal activity, for the commander ordering the inspection cannot help but be pleased with a negative result. Further, there is little reason to believe that a regularly scheduled inspection, not prompted by a report of specific criminal activity, would be condemned by the United States Court of Military Appeals.²¹¹ However, any prior knowledge of an offense, or a report of an offense, places the motivation for subsequent actions in the area where punitive consequences may be expected, and any subsequent quest for a specific item necessarily must be categorized as a search, which carries with it all the individual constitutional protections.

VII. CONCLUSIONS AND RECOMMENDATIONS

The law, perhaps more than any other profession, has developed words of art that become increasingly subject to dispute, not only among opposing parties but also among those carrying the burden of their application at the appellate level. The necessity of finding the requisite probable cause for a valid arrest or search provides a prime example. To the military lawyer, it must be readily apparent that the constitutional requirement of probable cause applies in the military as fully as in the federal practice.

To anyone who has been responsible for enforcing the law or prosecuting an accused, the logic of former Supreme Court Justice, Mr. Justice Stone, seems inescapable: "A criminal prosecution is more than a game in which the government may be checkmated and the game lost merely because its officers have not played according to the rule."²¹² This logic has not, however, been reflected in the results of the decided cases. While probable cause may be a "practical, nontechnical consideration," those wishing to show a cause for an invasion of privacy must, in fact, play according to the rules.

²¹¹ See *United States v. Lange*, 15 U.S.C.M.A. 486, 35 C.M.R. 458 (1965).

²¹² *McGuire v. United States*, 273 U.S. 95, 99 (1927).

MILITARY SEARCH AND SEIZURE

The difficulty in determining probable cause within the military is not in following the rules established, for although not mathematically certain, they are the practical considerations of everyday life. The problem is, rather, in determining in whose mind probable cause must exist. The answer is somewhat unusual, because the determination must be both subjective and objective. The commander must be personally convinced that probable cause exists, and the appellate courts must be convinced that he was reasonable in reaching his conclusions. This dual standard, though somewhat cumbersome, is necessary to insure full protection under the fourth amendment.

To make concrete recommendations is not an easy task when discussing search and seizure. The only recommendation open to the military lawyer, short of a constitutional amendment, is to urge the adoption of the civilian warrant procedure in the military. The issue is nearly moot, with the expressed wishes of the United States Court of Military Appeals that such procedure be adopted. However, it is submitted that the adoption of a search warrant procedure equal to the requirements observed in the civilian community by professionally trained magistrates would carry with it inherent dangers if required of the legally untrained commander. To have a search held unreasonable for want of probable cause which is in reality a failure of draftmanship would be equally as unjust as to allow searches not based on probable cause. If the objection to the lack of a formal warrant is really substantive and not merely procedural, a local directive requiring a summary of those events leading to a search serves the same purpose. Such a memorandum would enable the staff judge advocate initially to review the legality of the search and could also serve, if necessary, to refresh the memory of the commander at trial. Such a procedure would serve the same testimonial purposes as a warrant but would avoid the federal rule that limits a showing of probable cause to the warrant itself.

The confusion that appears to exist in the military concerning a commander's authority to conduct shakedown searches and shakedown inspections is not so much the failure of our appellate courts to distinguish between the two as it is the failure of the commander and his legal advisor to comprehend and comply with the rules established. A review of the cases reveals no need to fear a loss of the commander's authority to inspect. By the same token, there is little reason, or necessity, to conduct a shakedown search under the guise of inspecting. The shakedown search and

39 MILITARY LAW REVIEW

inspection remain valuable tools in the commander's possession with which to carry out his mission. But, in every instance, their use must be tempered with consideration for the soldier's rights under the fourth amendment.

THE DOCTRINE OF WAIVER*

By Major Edwin P. Wasinger**

This article presents a study of the doctrine of waiver as applied in criminal trials by civilian and military courts in the United States. The author explores the evolution, application, and present-day validity of the doctrine, particularly with respect to constitutional and fundamental rights. He concludes that full recordation in certain waiver situations, though not totally satisfactory, is the best course to be followed at the trial level.

I. INTRODUCTION

It is basically in accord with the efficient administration of judicial procedure that a failure by the accused to assert a known right or defense at the trial level should operate as a forfeiture of the issue on appeal. A procedure which permits an accused to raise objections for the first time on appeal, would frequently make fact-finders out of appellate agencies and/or cause interminable delay in prosecuting a case to final judgement. However, it may sometimes occur that an accused has a defense to offer which might be considered doubtful and dangerous to present and which he keeps to himself at the trial level. If a conviction results under such circumstances, especially in a capital case, it may be embarrassing and difficult perhaps literally to hang him on the basis that he or his advisors were less than candid and did not present his real defense to the trial court. Further, particularly in the recent past, with the great emphasis on and expansion of the fundamental and constitutional rights which surround an accused at or before the trial,¹ the noncompli-

*This article was adapted from a thesis presented to The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, while the author was a member of the Fifteenth Advanced Course. The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

**JAGC, U.S. Army; U.S. Army Judiciary, Office of the Judge Advocate General; B.S., 1957, LL.B., 1960, Marquette University; admitted to practice before the bars of the State of Wisconsin, the United States District Court, Eastern District of Wisconsin, the United States Court of Military Appeals, and the United States Supreme Court.

¹*E.g.*, *Miranda v. Arizona*, 384 U.S. 436 (1966) (exclusion of evidence of incommunicado pretrial interrogation); *Estes v. Texas*, 381 U.S. 532 (1965) (right to trial free from unreasonable publicity); *Escobeda v. Illinois*, 378 U.S. 478 (1964) (exclusion of evidence obtained after violation of

39 MILITARY LAW REVIEW

ance with any or all of which are sufficiently significant in the eyes of the judiciary to deny an accused a fair trial, courts may feel extremely reluctant to deny the full litigation of issues involving these rights merely on the basis of a procedural error by counsel. Faced with the dilemma of a rule designed to promote judicial efficiency and the possible unfairness which may result to an accused upon its application, the courts have, as to be expected, made the doctrine, by exceptions and interpretations, more equitable than literal implementation would demand. The attitude of the federal courts regarding the doctrine of waiver can be observed best in their treatment of constitutional or fundamental rights. This article on waiver will pursue the extent of that attitude in this area. The principle of a general relaxation of the strict application of the doctrine in itself on a clear equitable basis does not promote significant controversy. However, the implications inherent in some exceptions and interpretations to the rule and, indeed, the application of the exceptions to specific cases have met with vigorous dissent.² The extent of the relaxation of the doctrine regarding constitutional rights in the federal civilian courts and the scope and extent of the relaxation of the doctrine in the military judicial system have raised significant questions. The nature of these questions involve the definition of waiver as currently applied, the circumstances or the type of activity or inactivity by the defense under which waiver will be applied in federal criminal trials, and the validity of the historical doctrine, particularly from the viewpoint of preserving judicial efficiency.

11. ORIGIN AND HISTORICAL DEVELOPMENT OF WAIVER IN CRIMINAL TRIALS

The concept of waiver of rights and the uncertainty generated as to the proper application of the doctrine in the area of fundamental rights in federal criminal trials have their roots in the treatment accorded those rights in the ancient common law as well as in Colonial America. An understanding of the treatment of these rights and the reasons frequently cited therefor is significant in understanding the approach to the doctrine in the modern era.

a right to counsel); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel); *Wong Sun v. United States*, 371 U.S. 471 (1963) (exclusion of verbal evidence based on unlawful search).

² *E.g.*, *Henry v. Mississippi*, 379 U.S. 443, 457 (1965) (Harlan, J., dissenting); *Fay v. Noia*, 372 U.S. 391, 448 (1963) (Harlan, J., dissenting).

THE DOCTRINE OF WAIVER

A. CRIMINAL WAIVER AT COMMON LAW

As a positive individual principle uniformly applicable to a certain class of rights, the doctrine of waiver in criminal trials is not of great antiquity. It is conceded by the Supreme Court of the United States that under the rule of the common law an accused generally was not permitted to waive any right which was intended for his protection.³ Indeed, some state courts which the Supreme Court has cited approvingly have indicated that the accused, under the common law, could waive no right at all.⁴ The Wisconsin Supreme Court, in *Hack v. State*,⁵ asserted the generally accepted view that the underlying reasons for this principle at common law were unquestionably founded upon the anxiety of the courts to see that no innocent man should be convicted. More specifically, it was asserted that the accused in those days could not testify in his own behalf, frequently did not have benefit of counsel, and was punished, if guilty, by the death penalty or some other severe punishment out of all proportion to the gravity of his crime. Thus, it was said the concept of nonapplication of waiver was utilized by the courts to reverse a case where the accused had been unjustly convicted. Other authority has cited the principal reason for this rule to have been that conviction of crime operated to attain and forfeit official titles of inheritance, thereby affecting third party rights which were thought to be an improper subject of waiver by the accused parties.⁶ Indeed, these conclusions seem supported—or at least it may be conjectured that these reasons motivated in part the nonapplication of waiver—since the death penalty could be imposed for a great variety of cases. Even in Blackstone's day, no less than one hundred and sixty crimes were punishable by death.⁷ A closer look at the ancient English legal system, however, discloses perhaps a more practical reason why the doctrine never obtained a footing at common law. In England prior to 1640, there were no case reports of criminal trials, properly so-called, The only cases of which reports remained were for the most part politically significant cases⁸ which, because of the subject matter involved, may be suspect with regard to expounding generally applicable rules of

³ See *Patton v. United States*, 281 U.S. 276, 306 (1930).

⁴ See *Hack v. State*, 141 Wis. 346, 124 N.W. 492 (1910).

⁵ *Id.* at 351, 124 N.W. 494.

⁶ See *Dickinson v. United States*, 159 F. 801, 812 (1st Cir. 1908) (Aldrich, J., dissenting).

⁷ See 4 BLACKSTONE'S COMMENTARIES ON THE LAW 754 (Gavit ed. 1941).

⁸ 1 J. STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 325 (1883).

39 MILITARY LAW REVIEW

law. Although the trial procedure spoken of by the court in *Hack v. State* gradually changed after 1640, apparently without legislative enactment,⁹ in almost every criminal case in this era the only record consisted of a private memorandum book kept by an officer of the court. Herein was kept the jurors' names, an abstract of indictments, and a memo of pleas, verdicts, and sentences. If it became necessary to make up a record, this private memorandum book was employed to make up an elaborate account.¹⁰ The record of trial took no notice of evidence or instructions by the judge to the jury.¹¹ Even as late as the nineteenth century, there was practically no possibility of appealing on the facts in criminal cases and only a limited opportunity of appealing on the law. Often a pardon was the only remedy for an unjust conviction.¹² Thus, in view of these propositions, it would probably be more satisfactory to conclude that the judicial processes, including an absence of any significant record of the occurrences at the trial level and the extremely limited opportunity of an accused obtaining appellate review, were the primary factors in nonapplication of waiver, at least with regard to those rights associated with the admissibility of evidence. Those rights relating to the jury, indictments, pleas, verdicts, sentences, and other fundamental rights of trial in the nature of those ultimately secured to the citizens of the United States by the Federal Constitution, were practically the only rights to which the Supreme Court of Wisconsin, in *Hack v. State*, could have been referring, since the other ones were generally not appealable.

B. CRIMINAL WAIVER IN COLONIAL AMERICA

Even prior to the establishment of the union of states in America, some of the colonies were issuing reports of their cases. Although it is difficult to find any discussion of the concept of waiver in this era, it is clear that some colonial courts were not following the strict common law doctrine regarding waiver in criminal trials. Indeed, there is authority that an accused was permitted to waive such a substantial right as a trial by jury in the earliest days of the Maryland colony,¹³ and a reported Maryland

⁹See *id.* at 358.

¹⁰See *id.* at 308-09.

¹¹See *id.* at 309.

¹²*Id.*

¹³See Bond, *The Maryland Practice of Allowing Defendants in Criminal Cases to Choose a Trial Before a Judge or a Jury Trial*, 6 MASS. L.Q. 89 (1921).

THE DOCTRINE OF WAIVER

case as early as 1770 held accordingly.¹⁴ However, as case law developed, other courts are seen to have been influenced by the common law maxim of no waiver, at least to the extent that the accused could waive nothing in a capital case,¹⁵ and some courts included felony cases within this concept.¹⁶ In the early history of the United States, the primary thrust in regard to litigation of a waiver issue appears to have been centered on whether an accused could be permitted to waive the right under any circumstances, rather than whether an accused had waived such right intentionally and competently by virtue of some course of conduct or omission at the trial level.¹⁷ In addition, the waiver doctrine apparently was discussed only with regard to fundamental rights, and even in this area little guidance was given except in regard to the particular fundamental right at issue.¹⁸ It also appears that the doctrine was applied continually thereafter by most courts regarding admissibility of evidence and nonfundamental rights.

111. WAIVER IN FEDERAL CRIMINAL TRIALS

Many fundamental rights which were inherited by Colonial America from the common law were incorporated into the Federal Constitution. Perhaps because of the nature of these rights, as well as because of the treatment of these rights historically, constitutional rights were treated generally with the same deference as other fundamental rights. The reluctance of the state courts to apply waiver in the area of fundamental or state constitutional rights was inevitably carried over to the federal courts when the latter considered the application of waiver, as did the state courts, on a case-by-case, right-by-right basis. This reluctance is still seen at the beginning of the twentieth century. In *Ex parte Glenn*,¹⁹ a federal court applied the common law rule of no waiver to constitutional rights in felony cases. At this time, the rights guaranteed under the Federal Constitution to an individual accused of crime were not guaranteed generally to an

¹⁴ *Miller v. The Lord Proprietary*, 1 Md. (1 Harris & McHenry) 543 (1770).

¹⁵ *See* *Dempsey v. People*, 47 Ill. 323 (1868); *see also* *Gardner v. People*, 106 Ill. 76 (1883); *DeLoach v. State*, 77 Miss. 691, 27 So. 618 (1900).

¹⁶ *See Ex parte Dawson*, 20 Idaho 178, 117 P. 696 (1911); *State v. Cottrill*, 31 W. Va. 162, 6 S.E.428 (1888).

¹⁷ *See, e.g., Loper v. State*, 4 Miss. (3 How.) 429 (1839); *Fight v. State*, 7 Ohio 180 (1834).

¹⁸ *Id.*

¹⁹ 111 F. 257 (N.D. W.Va. 1901), *rev'd sub. nom.*, *Moss v. Glenn*, 189 U.S. 506 (1903).

accused in a trial in the several states.²⁰ Nevertheless, the federal courts began accepting and applying the doctrine of waiver concerning constitutional rights under limited circumstances in situations where federal constitutional rights were guaranteed to an accused. Thus, a federal statute which permitted waiver of rights in a federal territory was held constitutional,²¹ and such a fundamental and constitutional right as a trial by a jury of twelve could be waived on a misdemeanor charge²² or a minor offense.²³ As federal case law developed, distinctions frequently were drawn regarding the nature of even constitutional or fundamental rights as to whether waiver was or could be effected. The right of an accused to confront witnesses against him in a homicide trial, secured in this instance by the Philippine Civil Government Act, was held to have been waived because his counsel had introduced a record of trial of a previous assault and battery conviction arising out of the same transaction, which record contained the testimony of the witnesses. The fact that the record was introduced merely to support the contention that double jeopardy barred the homicide trial was not found to necessitate a different result.²⁴ Conversely, the accused's right to be present at his trial in a felony case was held not to have been waived by a failure to object, and if an accused was in custody or charged with a capital offense, the accused was seen as incapable of waiving the right.²⁵ In 1930 in *Patton v. United States*,²⁶ the Supreme Court again considered the issue of waiver in the context of a single constitutional right of an accused to a trial by jury. This case involved a situation where one of twelve jurors became ill during a week-long trial and where the accused, his counsel, and the prosecutor agreed to proceed with the trial with a panel of eleven jury members. On appeal from a felony conviction, the defense argued that the accused could not waive a jury in his trial and that the term "jury," as used in the Constitution in this context, consisted of twelve men, which right in this case was violated. The Supreme Court was persuaded that the term "jury" in this constitutional provision must be given the meaning it had at common law, which meant twelve members. However, the Court squarely rejected the concept that such right could not be waived,

²⁰ See, e.g., *Walker v. Sauvinet*, 92 U.S. 90 (1876).

²¹ See *Ex parte Belt*, 159 U.S. 95 (1895).

²² *United States v. Shaw*, 59 F. 110 (D. Ky. 1893).

²³ *Schick v. United States*, 195 U.S. 65 (1904).

²⁴ See *Diaz v. United States*, 223 U.S. 442 (1912).

²⁵ See *Hopt v. Utah*, 110 U.S. 574 (1884).

THE DOCTRINE OF WAIVER

on the basis that the reasons for nonapplication of the doctrine of waiver at common law no longer existed and therefore the common law rule need not be applied.²⁷

This case could be said to be the turning point in a shift of emphasis in court discussions of waiver from whether a specific fundamental right could be waived to the manner in which fundamental rights generally could be waived.

A. DOCTRINE OF WAIVER DEFINED

Eight years after the *Patton* case, in the landmark case of *Johnson v. Zerbst*,²⁸ the Supreme Court addressed itself to waiver as a general concept and defined the doctrine. In substance, this case involved two enlisted marines convicted in a federal district court for possessing and uttering counterfeit money. Both had been represented by counsel before trial and both pleaded not guilty. At the trial, the accused indicated they had no attorney and, in response to a question by the court, stated they were ready for trial.²⁹ One of the accused made a layman's attempt to defend himself which, as could be expected, was totally inadequate. After being sentenced to confinement at hard labor for four and a half years, Johnson brought a habeas corpus action on the basis of having been denied his constitutional right to have assistance of counsel for his defense as provided by the sixth amendment of the Constitution. The prosecution urged that the accused had waived his right to counsel. In addressing itself to this contention, the Court defined waiver by stating that it is "ordinarily an intelligent relinquishment or abandonment of a known right or privilege"³⁰ and that nothing less would bind the accused. This definition had been extensively and widely used in civil cases in one form or another for half a century before its adaptation by the Court to criminal trials in this case.³¹

Perhaps as guidance, the Court revealed that " 'courts indulge every reasonable presumption against waiver' of fundamental con-

²⁷281 U.S. 276 (1930).

²⁸*Id.* at 306.

²⁹304 U.S. 458 (1938).

³⁰No request had been made to the judge by the accused for assistance of counsel; however, there was conflict in the testimony as to whether a request had been made to the district attorney, who was alleged to have responded that in South Carolina counsel was appointed for an accused only in a capital case.

³¹304 U.S. at 464.

³¹*See* *Hoxie v. Home Ins. Co.*, 32 Conn. 21 (1864); *Currie v. Continental Cas. Co.*, 147 Iowa 281, 126 N.W. 164 (1910); *Perin v. Parker*, 126 Ill. 201, 18 N.E. 747 (1888).

39 MILITARY LAW REVIEW

stitutional rights" and noted "we 'do not presume acquiescence in the loss of fundamental rights.'"³² With respect to determining whether there has been a competent and intelligent waiver of a fundamental right in the context of the right to counsel, the Court indicated that this must depend in each case upon the peculiar facts, including the background, experience, and conduct of the accused. This determination of whether there is a proper waiver should be made clearly by the trial court, and it should appear on the record of trial. The Court suggested that the *Patton* case would be helpful as showing how and when a constitutional right may be waived, which of course represents an express waiver, participated in by the accused himself, and fully recorded.³³ The case was remanded for a determination whether the right to counsel had been properly waived, with the burden of proof on the accused.³⁴

Within the context of *Johnson v. Zerbst*, the strict rule against the application of waiver in a criminal trial is not considered to have been intended to apply beyond the realm of constitutional and fundamental rights. Indeed, most federal courts, either expressly or impliedly, have made this distinction between fundamental rights and other trial decisions in their consideration of waiver.³⁵ Some courts even seem to draw a distinction between some constitutional rights and others in regard to their fundamental nature and the manner in which these rights are waived.³⁶

B. DOCTRINE REFINED

The concept of the *Zerbst* doctrine may have been honored as much in its breach as in its application. Many courts continued to apply waiver upon finding procedural omissions in situations where a lack of either knowledge or intent on the part of the defense was evident.³⁷ Therefore, a quarter of a century later the

³² 304 U.S. at 464 (footnotes omitted).

³³ See note 26 *supra* and accompanying text.

³⁴ See 304 U.S. at 469.

³⁵ See, e.g., *United States ex rel. Goldsby v. Harpole*, 263 F.2d 71 (5th Cir.), *cert. denied*, 361 U.S. 850 (1959); *Tompsett v. Ohio*, 146 F.2d 95 (6th Cir. 1944), *cert. denied*, 324 U.S. 869 (1945); *Poe v. United States*, 233 F. Supp. 173 (D.D.C. 1964).

³⁶ Compare *Tompsett v. Ohio*, 146 F.2d 95 (6th Cir. 1944), *cert. denied*, 324 U.S. 869 (1945), with *Poe v. United States*, 233 F. Supp. 173 (D.D.C. 1964).

³⁷ See, e.g., *Rivera v. United States*, 318 F.2d 606 (9th Cir. 1963); *Mitchell v. United States*, 259 F.2d 787 (D.C. Cir.), *cert. denied*, 358 U.S. 850 (1958); *Tompsett v. Ohio*, 146 F.2d 95 (6th Cir. 1944), *cert. denied*, 324 U.S. 869 (1945).

THE DOCTRINE OF WAIVER

Supreme Court in *Fay v. Noia*³⁸ clarified certain aspects of the concept of waiver, while at the same time maintaining the “classic definition” of *Johnson v. Zerbst* as the controlling standard. In this case, Noia and two companions had been convicted in 1942 of felony murder occurring during the commission of a robbery. The convictions were based solely on the confessions of the three accused, which were allegedly coerced, Noia’s companions unsuccessfully appealed to the Appellate Division of the New York Supreme Court. However, both were released on the basis of their coerced confessions in subsequent legal proceedings. Noia, the trigger man in the robbery murder, had not appealed, and the time within which to appeal had expired. At the habeas corpus proceeding brought by Noia, the Government admitted the confession was coerced but contended that his failure to appeal within the prescribed time amounted to a waiver precluding him from being heard to complain in the habeas corpus proceeding. The Court held that petitioner’s failure to appeal was not a failure to exhaust the remedies available in the courts of the state, since that remedy was not open to him at the time he filed his application for habeas corpus in the federal court.³⁹ The Court then addressed itself to the waiver of the right to appeal. After approvingly reasserting the *Zerbst* doctrine of waiver, the Court refined what was meant by the prerequisites of knowledge and intent in the context of this case.

If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for *strategic, tactical, or any other reasons* that can fairly be described as the *deliberate by-passing of state procedures*, then *it is open to the federal court* on habeas to deny him all relief if the state courts refused to entertain his federal claims on the merits. . . . At all events we wish it clearly understood that the standard here put forth depends on the *considered choice of the petitioner?*”

This refinement clearly advanced the proposition that the accused must participate in the decision if the waiver is to bind him. It is highly unlikely that the Court meant to imply that this factor is a requirement in effecting a waiver of any and all rights. It is extremely doubtful that many accused, even given the relevant information on which to make a decision, particularly regarding the consequences of various trial decisions, would be-

= 372 U.S.391 (1963).

³⁹ See *id.* at 435.

⁴⁰ *Id.* at 439 (footnote omitted) (emphasis added).

39 MILITARY LAW REVIEW

come endowed with the necessary understanding required for an "intelligent and competent" waiver. While this language regarding personal waiver may be interpreted *to* apply to more than the single right to appeal, it should probably be considered to extend no further beyond the facts of the case than a situation which is similarly equivalent to acceptance of guilt and punishment of the accused by his attorney, such as a plea of guilty.

The Court also held that a federal judge has the discretion, in a habeas corpus action of this nature, to grant relief to the petitioner, even if the state has shown a proper waiver of the right on the part of the accused.⁴¹ Thus, the Court may be observed to have adopted two approaches which may be utilized to deny waiver. One involves a determination that the requirements of intelligence and competence in the *'Johnson v. Zerbst* definition of waiver, as refined by the "deliberate bypass" standard it had just established, have not been met. The other involves granting relief from waiver, even if the seemingly strict requirements are met, at the discretion of the judge. In applying the facts of the case to its definition, the Court apparently found, with some difficulty, that Noia had not waived his right under the first approach. The Court emphasized that Noia had not deliberately bypassed the state court system. The basic reason Noia did not appeal was, as the majority indicated, that he would have run a substantial risk of electrocution upon a possible retrial. "His was the grisly choice whether to sit content with life imprisonment or to travel the uncertain avenue of appeal which, if successful, might well have led to a retrial and death sentence."⁴² Under these facts, the Court felt Noia's personal choice could not "realistically be deemed a merely tactical or strategic litigation step, or in any way a deliberate circumvention of state procedures."⁴³

Initially, it is not clear how the petitioner would have run a substantial risk of electrocution had he appealed in 1942 which he did not run by bringing the habeas corpus action twenty years later. The conviction, according to the Court, rested solely on the basis of the constitutionally tainted evidence of a coerced confession. If Noia had been successful on appeal, this evidence could not have been used against him at a later trial. It is, of course conjecturable that witnesses available then may have become unavailable during the intervening years, but this seems to be a

⁴¹ *See id.* at 438.

⁴² *Id.* at 440.

⁴³ *Id.*

THE DOCTRINE OF WAIVER

tenuous pivotal point on which to turn the case. This in effect would imply that *Noia* could not possibly waive his right to appeal until extraneous circumstances arose which protected him either from conviction or from a greater degree of punishment for his offense. From a doctrinal standpoint, it appears that the same result could have been obtained more logically by the other approach the Court had established. The first approach asserts that, by applying the prerequisites of the rule, no waiver actually occurred. The second approach admits the accused effectively waived his rights but overlooks the waiver. This latter approach was considered justifiable by Mr. Justice Frankfurter in *Brown v. Allen*⁴⁴ in situations where an accused foregoes and even rejects his right to assert a ground at the trial level as a choice of strategy, because such a right is so substantial that it goes to the very foundation of the proceeding.⁴⁵ It is hardly questionable that the right to appeal is such a right, and, in addition, the *Noia* case also involved the issue of a trial free from a coerced confession, which right had previously been determined by the Court to be a right so fundamental that its violation makes the whole proceeding a mere pretense of a trial and the conviction wholly void.⁴⁶

Although the definition of the doctrine in *Johnson v. Zerbst* and the refinement of the doctrine in *Fay v. Noia* were established in the context of habeas corpus proceedings, this same definition is applicable equally to cases on direct review.⁷⁴

C. ANALYSIS OF FACTORS CONSIDERED IN APPLICATION OF WAIVER IN FEDERAL COURTS

1. *Intelligence and Competence.*

In the application of “the intentional relinquishment of a known right or privilege” definition of waiver laid down in *Johnson v. Zerbst*, many courts focused on the terms (“intentional” and “known right,” which were used interchangeably with the terms “intelligent” and “competent” in their relation to waiver.⁴⁸ The application of facts to these terms were viewed favorably to the accused, particularly in situations where the alleged waiver was made at a time when the accused was not represented by

⁴⁴ 344 U.S. 443 (1953).

⁴⁵ See *id.* at 503 (Frankfurter, J., concurring).

⁴⁶ See *Brown v. Mississippi*, 297 U.S. 278 (1936).

⁴⁷ See *Henry v. Mississippi*, 379 U.S. 443 (1965).

⁴⁸ See *Johnson v. Zerbst*, 304 U.S. 458 (1938).

39 MILITARY LAW REVIEW

counsel. Since a determination as to whether a waiver exists is to be made by a court under a totality of the circumstances concept,⁴⁹ it is not surprising that the education and background of the accused became an important consideration in determining whether an intelligent and competent waiver had occurred. Thus, in *Moore v. Michigan*,⁵⁰ it was held that a seventeen-year-old accused with a seventh grade education, who might have been fearful of mob violence, had not waived his right to counsel where several possible defenses involving questions of technical difficulty might have been involved.⁵¹

On the other hand, it was possible for an accused effectively to have waived a right on the basis that his education and background negated the absence of an intelligent and competent waiver. In *Crooker v. California*,⁵² the Court placed emphasis on the fact that the accused had one year of legal education, including study in criminal law, in rejecting his claim that he was prejudicially denied requested counsel at an interrogation which resulted in a nonassertion of his fifth amendment right to silence. So also an attorney, convicted of violating various selective service requirements, alleging that an attorney he had chosen to represent him had not done so properly, was held to have forfeited the issue on appeal, largely based on his educational background.⁵³ This concept of intelligence and competence with respect to an accused personally effecting a waiver is expected to become more and more strictly interpreted in favor of the accused, even in cases where the accused is apparently well-qualified from the point of view of education and background to make the decision. It is suggested that, in the area where the accused is alleged to have effected a waiver personally, without counsel, an extremely heavy burden is placed on the prosecution to demonstrate that the alleged waiver was knowingly and intelligently effected. Indeed, it is expected to be no less a burden than that required by *Miranda v. Arizona*,⁵⁴ in relation to the right of an accused to

⁴⁹ *Id.* at 464.

⁵⁰ 355 U.S. 155 (1957).

⁵¹ The defenses involved were insanity based on a remark by the accused to the judge in chambers while determining the providency of the accused's plea, and possible mistaken identity based on the fact that the evidence thereon was circumstantial evidence. *Cf. De Meerleer v. Michigan*, 329 U.S. 663 (1947). There, a seventeen-year-old accused confronted with a murder charge was hurried through legal proceedings which included a guilty plea, without being apprised of his right to counsel.

⁵² 357 U.S. 433 (1958).

⁵³ *Jones v. Pescor*, 169 F.2d 853 (8th Cir. 1948).

⁵⁴ 384 U.S. 436 (1966).

THE DOCTRINE OF WAIVER

silence under the fifth amendment of the Constitution.

2. *Personal Participation by the Accused.*

The prime factor in almost every current waiver case is the relationship between the accused and his counsel. As has previously been noted,⁵⁵ the refinement of the doctrine of waiver advanced the judgment that the accused must participate in the waiver in order to be bound thereby. Even before the Supreme Court in *Fay v. Noia* held that the decision not to appeal required personal participation, some courts were holding that in such fundamental rights as the entering of a plea⁵⁶ and the forbearance of asserting a right to trial by jury⁵⁷ personal participation was required. On the other hand, in the great majority of cases the action of his counsel was considered binding on the accused.⁵⁸ It appears that a literal application of the *Fay v. Noia* doctrine would require personal participation of the accused in order to effect a waiver for him of any right.⁵⁹ However, no federal court was affected by the *Fay v. Noia* language to the extent of espousing such a sweeping principle. Two years after this case, the Supreme Court in *Henry v. Mississippi*⁶⁰ addressed itself more specifically to the problem of personal participation. The case involved a Mississippi civil rights leader who was convicted of disturbing the peace. A youthful hitchhiker, who had been given a ride by the accused, alleged Henry made indecent advances toward him. The alleged victim described the interior of the automobile in detail, including the facts that the cigarette lighter had been inoperative and the ash tray contained Dentyne chewing gum wrappers. The arresting officer, who had obtained permission from Henry's wife to search the car, testified to corroborate the victim's description of the car's interior.⁶¹ The three attorneys for the defense, one of whom was a practicing Mississippi lawyer, made no objection on the basis of an illegal search to the intro-

⁵⁵ See note 40 *supra* and accompanying text.

⁵⁶ See, e.g., *United States v. Diggs*, 304 F.2d 929 (6th Cir. 1962).

⁵⁷ See, e.g., *United States ex rel. Goldsby v. Harpole*, 263 F.2d 71 (5th Cir.), *cert. denied*, 361 U.S. 850 (1959).

⁵⁸ See, e.g., *Brown v. Allen*, 344 U.S. 443 (1953); *United States ex rel. Reid v. Richmond*, 295 F.2d 83 (2d Cir.), *cert. denied*, 368 U.S. 948 (1961); *Mitchell v. United States*, 259 F.2d 787 (D.C. Cir.), *cert. denied*, 358 U.S. 850 (1958).

⁵⁹ See note 39 *supra* and accompanying text.

⁶⁰ 379 U.S. 443 (1965).

⁶¹ In order to sustain a conviction in Mississippi, the alleged victim's testimony must be corroborated. The testimony of the police officer was vital, since it served this function by tending to prove the presence of the alleged victim in the car. See *id.* at 444.

39 MILITARY LAW REVIEW

duction of the police officer's testimony.⁶² At the close of the case for the prosecution, the defense made a motion for a directed verdict, which was denied. In the argument on the motion, the defense contended—briefly and secondarily in point of context therein—that the evidence was the fruit of an illegal search. On appeal, the Mississippi Supreme Court held the corroborative evidence inadmissible. The court further decided not to invoke the doctrine of waiver, because of its reluctance to hold Henry's non-resident counsel to strict compliance with the contemporaneous objection rule. After the State filed a Suggestion of Error which established that Henry had also been assisted by local counsel, the court issued a new opinion holding that the failure to object constituted a waiver of the right to object. Certiorari was granted by the U.S. Supreme Court, and the conviction was vacated. The Court held that the contemporaneous objection rule was valid from the viewpoint of a legitimate state interest, but that nevertheless this interest might have been satisfied by the contention of the defense in its argument that the evidence was inadmissible. The disposition of the case resulted from the application of the *Zerbst* doctrine of waiver, as refined by *Fay v. Noia*. The Court took notice of a prosecution affidavit, which in effect offered to withdraw from its position of waiver on appeal if any one of the three counsel for the accused would file an affidavit that he did not know of the contemporaneous objection rule, and observed there was evidence that one of the accused's counsel stood up as if to object to the testimony but was pulled down by co-counsel. The Court noted the possibility that the facts might prove to be a '(deliberate bypass' of state procedure as envisioned in *Fay v. Noia*, perhaps for strategic reasons.⁶³ The case was remanded for a determination on a hearing as to whether the state interest had been satisfied and, if not, whether the activity of the defense amounted to a "deliberate bypass." In discussing the possibility of waiver, the Court stated that if strategic reasons had "moti-

⁶² Under Mississippi law, it was necessary to make an objection at the time of the introduction of the evidence to preserve the alleged error for appeal. This is known as the contemporaneous objection rule. *See id.* at 448.

⁶³ *See* 379 U.S. at 451. The Court suggested two possible reasons for such a move: The defense might have planned to allow introduction of the testimony regarding the inoperative cigarette lighter and then, if the motion for directed verdict were not granted, persuade the jury to acquit by establishing that the lighter did work and the testimony of the prosecution witnesses was untrustworthy. Also, the defense might have been inviting error deliberately by delaying objection to the evidence in the hope of laying a foundation for a reversal on appeal.

THE DOCTRINE OF WAIVER

vated the action, of petitioner's counsel, and their plans backfired, counsel's deliberate choice of the strategy would amount to a waiver binding on petitioner and would preclude him from a decision on the merits of his federal claim either in the state courts or here." ⁶⁴ The Court also specifically stated:

Although trial strategy adopted by counsel without prior consultation with an accused will not, where the circumstances are exceptional, preclude the accused from asserting constitutional claims [citation omitted], we think that deliberate bypassing by counsel of the contemporaneous objection rule as a part of trial strategy would have that effect in this case."⁶⁵

Thus, had the Court intended to apply the concept of personal participation of the accused in *Fay v. Noia* to all rights, as the language there literally implies, then *Henry* would have stood for a retreat from this position. Under the circumstances of this case, no personal participation was required to bind the accused, unless exceptional circumstances existed. The rationale of the Court in this area, it has been suggested,⁶⁶ is explained better by the nature of the right involved. In *Fay v. Noia*, the waiver was concerned with the right to appeal—an action equivalent to acceptance of guilt—which can be understood adequately by the accused and where the opportunity for consultation between counsel and the accused always exists. Such a constitutional and fundamental right requires personal participation. On the other hand, in *Henry v. Mississippi*, the waiver concerned was the admissibility of evidence in violation of a right against search and seizure—an action which is not equivalent to acceptance of guilt—which is subject to strategic or tactical maneuver in attempting to effect an acquittal. In these latter situations, the opportunity for consultation between attorney and client often does not exist, and even with consultation the average defendant would have difficulty comprehending the issue, much less making an informed decision. These situations do not call for personal participation in the absence of exceptional circumstances.

Prior to *Henry*, it was already clear that waiver would not be applied when the accused had personally made the decision as to the right involved, unless the forbearance was characterized by

⁶⁴ 379 U.S. at 451 (footnote omitted); cf. *Brookhart v. Janis*, 384 U.S. 1 (1966).

⁶⁵ 379 U.S. at 451-52.

⁶⁶ See Comment, *Criminal Waiver: The Requirements of Personal Participation, Competence and Legitimate State Interest*, 54 CALIF. L. REV. 1262 (1966), for a scholarly analysis of this topic.

39 MILITARY LAW REVIEW

an intelligent and competent decision.⁶⁷ However, in *Henry* the Court went one step beyond this proposition. In remanding the case for a factual determination whether a "deliberate bypass" had been effected by counsel, it impliedly held that the waiver of a constitutional and fundamental right by counsel must also be intelligent and competent. In the federal courts, the competency of the attorney traditionally was presumed, and inadequate preparation,⁶⁸ inexperience,⁶⁹ and flawed advice⁷⁰ were held to be insufficient to warrant reversal. Although it is a settled proposition of law that the sixth amendment of the Constitution guarantees an accused in a criminal trial a right to effective assistance of counsel,⁷¹ effective assistance of counsel is not the equivalent of a flawless defense.⁷² Indeed, were a flawless defense demanded by the courts, from the vantage point of hindsight, even the most experienced and capable of counsel would be subject to an occasional label of incompetent. In light of *Henry*, however, when any such error touches on a constitutional or fundamental right, no waiver will be applied. In other words, it appears that waiver has become a convenient means of exacting flawless representation in the area of a defendant's constitutional rights.

3. *Extraordinary Circumstances.*

Not infrequently fact situations develop which, if applied literally to the established definition of waiver, should logically result in a forfeiture of the issue on appeal. Nevertheless courts arrive at a contrary result. These may be called "extraordinary circumstance" cases perhaps best illustrated by *Fay v. Noia*.⁷³ There, the defendant had intentionally chosen not to appeal, but the waiver was held not binding on him because the waiver had been forced on him by requiring a "grisly choice" between accepting life imprisonment or appealing the conviction under the possibility of being retried and receiving the death penalty. Although it appears that the Court found Noia's failure to appeal was not a deliberate circumvention of state procedure, it con-

⁶⁷ See *Johnson v. Zerbst*, 304 U.S. 458 (1938).

⁶⁸ See *Tompsett v. Ohio*, 146 F.2d 95 (6th Cir. 1944), *cert. denied*, 324 U.S. 869 (1945).

⁶⁹ See *Farrell v. Lanagan*, 166 F.2d 845 (1st Cir.), *cert. denied*, 334 U.S. 853 (1948).

⁷⁰ See *Thomson v. Huff*, 149 F.2d 842 (D.C. Cir. 1945).

⁷¹ See *Powell v. Alabama*, 287 U.S. 45 (1932).

⁷² See, e.g., *Rivera v. United States*, 318 F.2d 606 (9th Cir. 1963); *Mitchell v. United States*, 259 F.2d 787 (D.C. Cir.), *cert denied*, 358 U.S. 850 (1958); *United States ex rel. Koffel v. Myers*, 167 F. Supp. 510 (E.D. Pa. 1958).

⁷³ 372 U.S. 391 (1963).

THE DOCTRINE OF WAIVER

ceded that it was intentional and knowing.⁷⁴ The pivotal factor seems clearly to have been the exceptional circumstances forcing him to the choice. It is submitted that the Court in this case made no effective distinction of this factor, which nevertheless existed and in fact appears to be the controlling feature for not applying waiver. The distinction, if made, would have been more appealing from a doctrinal point of view regarding waiver. The effect of the *Fay v. Noia* decision on lower federal courts in these circumstances is illustrated in *Whitus v. Balkcom*,⁷⁵ which continued the doctrinal confusion by deciding the case on several bases in a similar situation. The case involved an all-white jury, which defendant and counsel did not challenge or object to because an attack on the composition of the jury would tend to create a community atmosphere of hostility, not only towards the accused but towards counsel defending the accused as well. Here, as in *Fay v. Noia*, the defendant had a choice which he intentionally and deliberately exercised; however, it was a "choice of evils."⁷⁶ It was a choice of either accepting a jury chosen by a procedure systematically excluding Negroes or creating a community atmosphere of hostility. The court considered this "one of those extraordinary cases"⁷⁷ discussed in *Brown v. Allen*⁷⁸ under which waiver should not be applied. However, the court went on to indicate that the facts of the case, as applied to the *Johnson v. Zerbst* definition of **waiver**,⁷⁹ showed "no 'deliberate,' meaningful **waiver**."⁸⁰ In addition, in view of *Fay v. Noia*, the court, in a federal habeas corpus proceeding, could not permit a state ground rule to frustrate the federally guaranteed right to a fairly constituted jury. Here, as in *Fay v. Noia*, the circumstances showed an intentional and knowing failure to act by the defense and, as in *Noia*, the court struggled to reach a logical conclusion that no deliberate waiver had occurred. The logical confusion of the rationale in *Noia*, however, was compounded in this case, as the court already had found the circumstances to be analogous to those extraordinary cases envisioned in *Brown v. Allen*, to which waiver should not be applied even when the prerequisites of waiver are present. The determination that exceptional circum-

⁷⁴ See *id.* at 438-40.

⁷⁵ 333 F.2d 496 (5th Cir.), *cert denied*, 379 U.S. 931 (1964).

⁷⁶ *Id.* at 499.

⁷⁷ *Id.* at 505.

⁷⁸ 344 U.S. 443 (1953), discussed at note 44 *supra* and accompanying text.

⁷⁹ See note 30 *supra* and accompanying text.

⁸⁰ 333 F.2d at 509.

39 MILITARY LAW REVIEW

stances do not exist in a particular case generally is reached with much greater facility.⁸¹

4. *Legitimate State Interest.*

In approaching a consideration of whether a waiver existed under the doctrine as previously defined, an initial consideration will normally be whether the procedural rule allegedly waived is one which contains a legitimate state interest. Prior to the *Henry* case,⁸² it was not unusual, once that determination was made, for a court's inquiry to terminate.⁸³ However, in *Henry*, when the Court had found that the Mississippi procedural rule of contemporaneous objection with regard to an offer of inadmissible evidence had served a legitimate state interest, it went beyond that determination. It continued its search to determine whether the reasons for the validity of the state interest perhaps had been satisfied by mention of counsel, in his argument on the motion to dismiss that the evidence was inadmissible because of an illegal search.⁸⁴ Although the Court did not arrive at a decision in this regard, it stated, in effect, in connection with its determination to remand, that the Mississippi Supreme Court might find the interest of the state had been satisfied by the motion,⁸⁵ and therefore the question of waiver may not have to be resolved in a federal forum.⁸⁶

The U.S. Supreme Court's step in this direction apparently is motivated by a desire to implement the principle that the federal interest in the preservation of an accused's constitutional or fundamental rights predominates over the state's interest in the procedural requirements, particularly when enforcement of the rule "would be to force resort to an arid ritual of meaningless form."⁸⁷

5. *Recordation.*

The pronouncement of the Supreme Court in *Johnson v. Zerbst*, that "'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights" and that "we 'do not

⁸¹ See, e.g., *Wilson v. Gray*, 345 F.2d 282 (9th Cir.), cert. denied, 382 U.S. 919 (1965); *United States ex rel. Kozicky v. Fay*, 248 F.2d 520 (2d Cir. 1957), cert. denied, 356 U.S. 960 (1958).

⁸² *Henry v. Mississippi*, 379 U.S. 443 (1965), discussed at note 60 *supra* and accompanying text.

⁸³ See, e.g., *Edelman v. California*, 344 U.S. 357 (1953).

⁸⁴ See note 63 *supra* and accompanying text.

⁸⁵ 379 U.S. at 448.

⁸⁶ *Id.* at 453.

⁸⁷ *Staub v. Baxley*, 355 U.S. 313, 320 (1958).

THE DOCTRINE OF WAIVER

presume acquiescence in the loss of fundamental rights,' ..⁸⁸ in addition to its emphasis in examining the total circumstances of each case, set the stage for a possible requirement for recording the circumstances surrounding a waiver. However, no requirement of recordation as such exists. Some courts have taken the position that waiver cannot be applied "when the record is silent or inconclusive concerning knowledge,"⁸⁹ and the case generally is remanded for a factual determination of the issue at a hearing.⁹⁰

IV. WAIVER IN MILITARY LAW UNDER THE UNIFORM CODE OF MILITARY JUSTICE

A. *CONSTITUTIONAL AND FUNDAMENTAL RIGHTS*

Although it is doubtful that all fundamental and constitutional rights guaranteed to individuals in a criminal trial in the federal courts also are guaranteed to military defendants, it is clear that many fundamental and constitutional rights have been incorporated into the concept of military due process.⁹¹ In one of the early cases decided by the Court of Military Appeals under the *Uniform Code of Military Justice*,⁹² the Court stated:

There are certain standards in the military accusatorial system which have been specifically set by Congress and which we must demand be observed in the trials of military offenses. . . . We conceive these rights to mold into a pattern similar to that developed in federal civilian cases. For lack of a more descriptive phrase, we label the pattern as "military due process", . . .⁹³

The Court went on to say that these rights and privileges were not bottomed on the Constitution but on the laws enacted by Congress. The Court interpolated that "this does not mean that we can not give the same legal effect to the rights granted by Congress to military personnel as do civilian courts to those granted to civilians by the Constitution or by other federal statutes."⁹⁴ The Court's cursory inspection of the Code revealed that Congress granted the military accused rights which parallel those accorded to defendants in civilian courts, which were determined to consist of at least the following:

⁸⁸ 304 U.S. at 464 (footnotes omitted).

⁸⁹ Wood v. United States, 128 F.2d 265, 277 (D.C. Cir. 1942).

⁹⁰ See, e.g., Henry v. United States, 379 U.S. 443, 451-53, (1965).

⁹¹ See United States v. Jacoby, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960).

⁹² Hereafter called the Code and cited as UCMJ art. 7.

⁹³ United States v. Clay, 1 U.S.C.M.A. 74, 77, 1 C.M.R. 74, 77 (1951).

⁹⁴ *Id.*

39 MILITARY LAW REVIEW

To be informed of the charges against him; to be confronted by witnesses testifying against him; to cross-examine witnesses for the government; to challenge members of the court for cause of peremptorily; to have a specified number of members compose general and special courts-martial; to be represented by counsel; not to be compelled to incriminate himself; to have involuntary confessions excluded from consideration; to have the court instructed on the elements of the offense, the presumption of innocence, and the burden of proof; to be found guilty of an offense only when a designated number of members concur in a finding to that effect; to be sentenced only when a certain number of members vote in the affirmative; and to have an appellate review."

The Court cited *Johnson v. Zerbst*⁹⁶ with reference to waiver and suggested that the principles of that case were transplanted into the military system particularly regarding due process rights.⁹⁷ The Court left little doubt that the accused could waive at least some of the safeguards around him.⁹⁸ Once these basic fundamental rights paralleling the fundamental and constitutional rights guaranteed to defendants in federal civilian criminal trials were delineated generally from other rights, it appeared that the stage was set for the military judiciary's decisional treatment of these rights to follow the federal dichotomy. However, the treatment of the doctrine of waiver by the *Manual for Courts-Martial, United States, 1951*,⁹⁹ tended to change the envisioned direction.

B. WAIVER IN THE MANUAL

The Manual provides for waiver, with respect to admissibility of evidence, as a general proposition¹⁰⁰ but also focuses specifically on waiver as an integral treatment of specific rights and privileges. With respect to admissibility of evidence, waiver will be applied where it clearly appears that the party who failed to object to the inadmissible evidence understood the right to object and clearly did not desire to assert his right. A mere failure to object was not envisioned as a waiver, except as otherwise stated in the Manual.¹⁰¹ This concept apparently embraced the *Johnson v. Zerbst* doctrine that waiver is ordinarily an intentional relinquishment of a known right or privilege, which there was applied to a fundamental right. On the other hand, in some areas where

⁹⁵ *Id.* at 77-78, 1 C.M.R. at 77-78.

⁹⁶ 304 U.S. 458 (1938).

⁹⁷ 1 U.S.C.M.A. at 79, 1 C.M.R. at 79.

⁹⁸ *See id.* at 81.

⁹⁹ Hereafter called the Manual and cited as MCM ¶ ____.

¹⁰⁰ MCM ¶ 154d.

¹⁰¹ *Id.*

THE DOCTRINE OF WAIVER

the Manual treats waiver with respect to specific rights or privileges, the prerequisites established regarding admissibility of evidence generally do not **apply**.¹⁰²

The Court of Military Appeals, as well as the boards of review, generally have enforced these Manual **provisions**.¹⁰³

C. MILITARY JUDICIAL APPROACH TO WAIVER

Despite the fact that the Manual had established the prerequisites for waiver of rights relating to admissibility of evidence, the Court of Military Appeals in one of its earliest cases, *United States v. Masusock*,¹⁰⁴ took occasion to face the issue and set forth the rule by which it would be guided.

[B]efore this court will review an assignment of error based on the inadmissibility of evidence, where it clearly appears that the defense understood its right to object, except in those instances of manifest miscarriage of justice, there must be an appropriate objection or protest lodged before the trial court so that the court and opposing counsel will be put on notice that the admissibility is in dispute. Otherwise we will consider the objection waived."

Although there had been no objection made at the trial to the admissibility of the morning report at issue in the case, the Court was not disposed to rest its decision on the application of waiver. Despite the clear language regarding waiver, the Court felt compelled to consider the case on its merits and, in doing so, found no error. This approach of asserting that the doctrine of waiver could be applied and then proceeding to the merits and finding no error as such, or at least no more than harmless error, foreshadowed the single most predominant characteristic of military waiver.

In light of the later application of the rule, it is necessary to

¹⁰² See MCM ¶143b(1) (a mere failure to object is deemed a waiver, where the failure relates to proof or authentication of the contents of a writing); ¶150b (giving testimony waives the right to assert the privilege against self-incrimination); ¶70a (entry of a plea, in the absence of a motion for appropriate relief, waives any objection which must be made by motion for appropriate relief before a plea is entered, including a misnomer of the accused); ¶67a (failure to assert defenses and objections in bar, such as statute of limitations, former jeopardy, pardon, constructive condonation of desertion, former punishment, and promised immunity, prior to the conclusion of the hearing of a case waives the right).

¹⁰³ See, e.g., *United States v. Perkins*, 1 U.S.C.M.A. 502, 4 C.M.R. 94 (1952); CM 365236, *Gubser*, 12 C.M.R. 229 (1953); CGCM 9744, *Seybert*, 1 C.M.R. 592 (1951); but see *United States v. Lawson*, 16 U.S.C.M.A. 260, 36 C.M.R. 416 (1966).

¹⁰⁴ 1 U.S.C.M.A. 32, 1 C.M.R. 32 (1951).

¹⁰⁵ *Id.* at 34, 1 C.M.R. at 34.

39 MILITARY LAW REVIEW

recognize the reasons for the acceptance of the concept of waiver into the military judiciary system. The Court of Military Appeals appeared concerned that permitting a party to prosecute one theory in the trial court and substitute another on appeal, or perhaps even to assert error arising out of his election to proceed on a selected theory, would lead to an inefficient appellate system, interminable delays in processing a trial to final judgment, and careless trial representation.¹⁰⁶ In addition, an objection first asserted on appeal would result in placing an unlitigated issue before the appellate tribunal. In other words, the appellate tribunal would be presented with a record of trial barren of facts, without a legal way of getting the information on the record.

While the doctrine of waiver as laid down in *Masusock* incorporated, generally, both the Manual and the *Johnson v. Zerbst* doctrine of knowledge, it obviously provided a further element which created substantial flexibility for the Court in determining the application of waiver on an ad hoc basis. Under this rule, waiver would be applied only under one set of circumstances, to wit, where the defense understood its right to object but failed to object at the trial level and where the application of waiver would not operate to result in a manifest miscarriage of justice. What degree of knowledge by the defense was required and what degree of error would constitute a miscarriage of justice were, by their nature, questions necessarily left unanswered by the guidelines set down in *Masusock*.

The nature of the right involved in any issue of waiver is also considered significant in the military judicial system.¹⁰⁷ It appears that the nearer a right is considered to be to a right described as "a structural member of the judicial edifice,"¹⁰⁸ the more difficult, if not totally impossible, it becomes to waive the right. Thus, the military judicial system has held that a fundamental right, peculiar to a military defendant, to be tried by a court free from command influence is not waivable;¹⁰⁹ that the right to a review by the Court of Military Appeals cannot be waived, even by the accused personally after consultation with counsel;¹¹⁰ and that the right to a public trial is more difficult to waive in the military

¹⁰⁶ *Id.*

¹⁰⁷ *See, e.g.,* United States v. Welch, 1 U.S.C.M.A. 402, 3 C.M.R. 136 (1952); ACM S-4372, Burton, 7 C.M.R. 848 (1953).

¹⁰⁸ United States v. Vanderpool, 4 U.S.C.M.A. 561, 568, 16 C.M.R. 135, 142 (1954).

¹⁰⁹ *See* CM 399362, Charleson, 26 C.M.R. 630 (1958).

¹¹⁰ *See* United States v. Doherty, 10 U.S.C.M.A. 453, 28 C.M.R. 19 (1959).

than in the federal courts.¹¹¹ In many situations, the consideration by the military appellate tribunals of waiver issues focuses on recognition of the fundamental or constitutional nature of the right and the caveat that waiver of such a right must be scrutinized closely.¹¹² In addition, the treatment of these rights frequently entails a verbatim recitation of the *Johnson v. Zerbst* doctrine of waiver.¹¹³ In view of this pointed emphasis on fundamental and constitutional rights, it is not illogical that the treatment of these rights should have been expected to become merged under the concept of waiver applicable to admissibility of evidence. This is suggested, since the *Masusock* concept can be applied more strictly against waiver than can the *Johnson v. Zerbst* doctrine. Indeed, as the body of case law in the military developed, this expectation became a realization, particularly in the area of such fundamental rights as freedom from unreasonable search and the protection of the right against self-incrimination, which by their nature are normally raised similarly to rights regarding admissibility of evidence.¹¹⁴

D. ANALYSIS OF FACTORS INVOLVED IN MILITARY DOCTRINE

The development of case law under the Code saw the *Masusock* rule applied mechanically to any government allegation of waiver resulting, generally, in a finding that waiver would not be applied¹¹⁵ or that waiver could have been applied had error been shown to have occurred.¹¹⁶ However, certain factors in the various discussions of the concept of waiver achieved significant importance in determining whether the requisite knowledge existed or whether a manifest miscarriage of justice would occur if a waiver was found. These factors are significant to an appreciation of the concept of waiver as applied in the military.

¹¹¹ See ACM 10016, Zimmermann, 19 C.M.R. 806 (1955).

¹¹² See *United States v. Vanderpool*, 4 U.S.C.M.A. 561, 16 C.M.R. 135 (1954); *United States v. Cooper*, 2 U.S.C.M.A. 333, 8 C.M.R. 133 (1953).

¹¹³ See *United States v. Berthiaume*, 5 U.S.C.M.A. 669, 18 C.M.R. 293 (1955); *United States v. Vanderpool*, 4 U.S.C.M.A. 561, 16 C.M.R. 135 (1954).

¹¹⁴ See, e.g., *United States v. Dial*, 9 U.S.C.M.A. 700, 26 C.M.R. 480 (1958); *United States v. Henry*, 4 U.S.C.M.A. 158, 15 C.M.R. 158 (1954).

¹¹⁵ See, e.g., *United States v. Sitren*, 16 U.S.C.M.A. 321, 36 C.M.R. 477 (1966); *United States v. Russell*, 15 U.S.C.M.A. 76, 35 C.M.R. 48 (1964); *United States v. Ebarb*, 12 U.S.C.M.A. 715, 31 C.M.R. 301 (1962).

¹¹⁶ See, e.g., ACM S-4917, *Niday*, 7 C.M.R. 812 (1953); ACM 5745, *Goodman*, 7 C.M.R. 660 (1952).

39 MILITARY LAW REVIEW

1. *Knowledge.*

One of the prime considerations in determining whether the right to object was understood is the competency of the defense counsel. This was not only implied in the original *Masusock* decision, but it is almost a necessity, in view of the fact that military case law hardly touches the requirement of personal participation as envisioned by the Supreme Court of the United States. The Court of Military Appeals' reluctance "to charge an accused with the responsibility of his counsel's failure to seek appropriate guidance"¹¹⁷ demands no less. Thus, the absence in special courts-martial of counsel qualified under article 27b of the Code results in waiver normally not being applied therein.¹¹⁸ The Court is also loath to apply it in a special court-martial where counsel are qualified, because the government counsel occupies a position which casts on him a duty not to misapply the law, particularly as he is lawyer and advisor to the court-martial.¹¹⁹ On the other hand, if the counsel for the accused is zealous and his actions are seen to have been motivated by and to have pursued the interests of the accused, a waiver is more apt to be applied.¹²⁰ Defense counsel's conduct evincing that he is unaware of the true significance of the issue prevents the application of waiver.¹²¹ This keen look at the adequacy of counsel has been extended by one of the judges, in a case involving the admissibility of a juvenile conviction, to the point where waiver would not be applied where the asserted waiver by counsel is one of a number of incidents which are alleged to raise an issue of inadequacy of counsel.¹²² Under any circumstances, an allegation of inadequacy of counsel is a far cry from incompetency in fact. The case of *United States v. Cary*¹²³ points out a frequently unspoken, but evident, concern by the military appellate bodies that an accused should not be prejudiced because of the lack of skill and, perhaps, preparation on the part of his counsel. Normally, an accused alleging inadequate counsel must show reasonably that

¹¹⁷ *United States v. Sitren*, 16 U.S.C.M.A. 321, 322, 36 C.M.R. 477, 478 (1966).

¹¹⁸ *See, e.g., United States v. Zemartis*, 10 U.S.C.M.A. 353, 27 C.M.R. 427 (1959).

¹¹⁹ *See United States v. Hatter*, 8 U.S.C.M.A. 186, 23 C.M.R. 410 (1957).

¹²⁰ *See United States v. Cooper*, 2 U.S.C.M.A. 333, 8 C.M.R. 133 (1953); *United States v. Vanderpool*, 4 U.S.C.M.A. 561, 16 C.M.R. 135 (1954).

¹²¹ *See ACM 396830, Hayes*, 24 C.M.R. 440 (1957).

¹²² *See United States v. Cary*, 9 U.S.C.M.A. 348, 351, 26 C.M.R. 128, 131 (1958) (Quinn, C.J., concurring).

¹²³ 9 U.S.C.M.A. 348, 26 C.M.R. 128 (1958).

THE DOCTRINE OF WAIVER

the proceedings in which he was convicted were so erroneous as to constitute a ridiculous and empty gesture, or were so tainted with negligence or wrongful motives on the part of his counsel as to manifest a complete absence of judicial character.¹²⁴ Under these circumstances, it is clear that the accused is not guaranteed skillful counsel. Hence, the nonapplication of waiver here, as in the federal courts, creates an ideal vehicle to protect an accused from prejudicial error, or perhaps even the possibility of prejudicial error, made by his counsel. For example, in *United States v. Smith*,¹²⁵ the defense counsel failed to object to what the Court described as "a plethora of hearsay and opinion testimony"¹²⁶ by prosecution witnesses, which was a substantial and important part of the prosecution's case. The Court refused to apply waiver in this case since, in view of the admission of hearsay in the quantity and under the circumstances involved, such action would not serve justice. Under this difficult standard of proof required to show inadequate representation in the military, a challenge on such ground might well have been unsuccessful on appeal. However, even had it been successful, nonapplication of the doctrine of waiver obtained the same result with comparatively less effort or strain. It is not difficult to envision both counsel in the case being extremely inexperienced, from whose trial practice the accused deserved to be rescued; the nonapplication of the waiver doctrine was most expedient in effecting that result.

Although the *Smith* case is an extreme example, perhaps suggesting that a question of skill was not involved at all, numerous cases where the error of counsel in failing to object might be considered relatively miniscule were handled with the same *dispatch*.¹²⁷ This suggests the right to a defense free even of *possible* prejudice for the **accused**.¹²⁸

Another key factor influencing military appellate bodies springs from the often asserted requirement that knowledge by the defense must be proved by the party alleging waiver.¹²⁹ Thus, in *United States v. Silva*,¹³⁰ where the defense counsel personally made an erroneous reference to a command regulation on elimination of certain types of offenders, the record was observed

¹²⁴ See *United States v. Haff*, 11 U.S.C.M.A. 397, 29 C.M.R. 213 (1960).

¹²⁵ 3 U.S.C.M.A. 15, 11 C.M.R. 15 (1953).

¹²⁶ *Id.* at 16, 11 C.M.R. at 16.

¹²⁷ See, e.g., *United States v. Phillips*, 2 U.S.C.M.A. 534, 10 C.M.R. 32 (1953).

¹²⁸ See *id.*

¹²⁹ See *United States v. Lawson*, 16 U.S.C.M.A. 260, 36 C.M.R. 416 (1966).

¹³⁰ 8 U.S.C.M.A. 105, 23 C.M.R. 329 (1957).

39 MILITARY LAW REVIEW

to show insufficiently the reason for his reference, and waiver would not be applied. The stated rationale was that he may have been forced to make such mention by other factors not known to the reviewing body. Of course, in many types of cases where waiver is alleged, knowledge by the defense is clearly evident from the record. Such cases may involve a failure to object to instructions by the law officer which appear verbatim on the record, or a failure to challenge court members after they disclose some prior connection with the case. However, even in these circumstances, particularly regarding instructions, in the absence of a positive showing that the defense appreciated the ramifications of the information on the record, waiver will not be applied.¹³¹ In view of this approach and the generally accepted proposition that most trial waivers cannot be fully recorded because they frequently consist of omissions rather than affirmative acts, the appellate forums frequently look to the trial tactics of the defense to establish knowledge or to show a lack of knowledge with respect to an alleged waiver. In the event an affirmative position consistent with knowledge is established, a waiver may be applied. Thus, in *United States v. Cooper*,¹³² one of the accused was permitted by the law officer to present evidence outside the presence and hearing of the court concerning the inadmissibility of the accused's confession by reason of involuntariness. At the conclusion of the hearing, in open court, the confession was admitted over the objection of the defense. Prior to the out-of-court hearing, the law officer had advised each accused of his right to take the stand in open court for the limited purpose of testifying as to the character of his confession. On appeal, counsel argued that appellant had been deprived of his right to have the issue of voluntariness resolved by each member of the court-martial. The Court of Military Appeals unanimously held that the defense had expressly waived that right. It found that the defense's actions were thoughtful and deliberate and amounted to an affirmative position, as a matter of tactics, not to have the issue resolved by the court-martial members. Competent counsel, seeking to protect a client's interest with full knowledge of what he was doing, was the picture projected by the record of trial. This type of situation was, of course, on all points similar to one of the prime reasons for adopting the concept of waiver as

¹³¹ See *United States v. Beer*, 6 U.S.C.M.A. 180, 19 C.M.R. 306 (1955); CM 362921, *Sitterly*, 10 C.M.R. 523 (1953).

¹³² 2 U.S.C.M.A. 333, 8 C.M.R. 133 (1953).

THE DOCTRINE OF WAIVER

asserted in the *Masusock* case.¹³³ Knowledge or the absence thereof by the defense has often been discussed and sometimes found by separate judges, often in separate opinions, in light of some action by the defense consistent with a theory of defense or operating in some manner to the benefit of the accused.¹³⁴ Thus, in a narcotics case, where the defense advanced a theory that the accused had been given narcotics in a Japanese household while so intoxicated that he didn't know he was receiving dope, a failure to object to evidence of the results of a urinalysis was thought to be sufficient evidence that a knowledgeable waiver had occurred.¹³⁵

Perhaps the best definition of what is required to satisfy the requirement of knowledge is the statement of the Court in *United States v. Moore*¹³⁶ with reference to an instruction regarding lesser included offenses :

[W]aiver [will] be invoked if the record [demonstrates] "an affirmative, calculated, and designed course of action by a defense counsel before a general court-martial" to the end that he led the presiding law officer to believe he did not desire instructions on lesser included offenses."

2. *Manifest Miscarriage of Justice.*

An analysis of the meaning of "manifest miscarriage of justice" in relation to the precise degree of error which results in the nonapplication of waiver in any specific case would be Herculean task. The fact that the reported cases interchangeably describe the circumstances to which this standard is applied, whether it results in waiver or not, as being *extraordinary*,¹³⁸ *special*,¹³⁹ or *exceptional*¹⁴⁰ circumstances does not lighten the task. However, regardless of the adjective used to describe the circumstances, it is clear that fact situations illustrated by such

¹³³ See note 106 *supra* and accompanying text.

¹³⁴ See *United States v. Henry*, 4 U.S.C.M.A. 158, 160-61, 15 C.M.R. 158, 160-61 (1954) (Brosman, J., concurring in the result); *United States v. Josey*, 3 U.S.C.M.A. 767, 778, 14 C.M.R. 185, 196 (1954) (Quinn, C.J., concurring).

¹³⁵ See *United States v. Williamson*, 4 U.S.C.M.A. 320, 330, 15 C.M.R. 320, 330 (1954) (Brosman, J., concurring).

¹³⁶ 12 U.S.C.M.A. 696, 31 C.M.R. 282 (1962).

¹³⁷ *Id.* at 700. 31 C.M.R. at 286.

¹³⁸ See *United States v. Vanderpool*, 4 U.S.C.M.A. 561, 570, 16 C.M.R. 135, 144 (1954).

¹³⁹ See *United States v. Henry*, 4 U.S.C.M.A. 158, 160, 15 C.M.R. 158, 160 (1954).

¹⁴⁰ See *United States v. Clark*, 4 U.S.C.M.A. 650, 653, 16 C.M.R. 224, 227 (1954).

39 MILITARY LAW REVIEW

cases as *Fay v. Noia*¹⁴¹ and *Whitus v. Balkom*,¹⁴² where the defendant exercises a choice, but a "choice of evils," and with which federal courts are experiencing at least doctrinal difficulties, can be handled routinely in the military. Thus, in *United States v. Smith*,¹⁴³ where the accused was questioned by the president of the court in open court, not in the impartial role of his position as a jury foreman but virtually as an assistant prosecutor, the error was not waived by the failure of the defense to object. Under the circumstances, an objection would have accomplished little more than antagonizing one or more members of the court against the accused. His choice was between a strong risk of offending at least one member of the court, if not more, or of prejudicing his case on review by failing to object. In a concurring opinion, Judge Latimer had no difficulty invoking the rule that waiver will not be applied "when to do so would work a manifest miscarriage of justice."¹⁴⁴

In many instances, however, a manifest miscarriage of justice or the lack thereof is not discussed so thoroughly. It appears that the absence of a manifest miscarriage of justice not infrequently may be implicit in other terms employed by the Court. These circumstances may arise when evidence is erroneously admitted with or without objection, and the accused on his own motion introduces evidence which cures the error. An illustrative case in this regard is *United States v. Hatchett*,¹⁴⁵ where the accused testified for the limited purpose of giving evidence on the involuntariness of his pretrial statement. Questions, which might have exceeded the fair bounds of cross-examination, were directed to and answered by the accused without objection. The Court held that any error which might have occurred had been *cured* by the subsequent testimony of the accused concerning the offense, which amounted to a judicial confession. Likewise, in *United States v. Fisher*,¹⁴⁶ the Court indicated that where a defendant objects to the introduction of evidence which is admitted and afterwards introduces the same evidence himself, generally the admission of the testimony over the objection is in effect waived, even though the ruling was erroneous. To foreclose the

¹⁴¹ 372 U.S. 391 (1963), discussed at note 38 *supra* and accompanying text.

¹⁴² 333 F.2d 496 (5th Cir.), *cert. denied*, 379 U.S. 931 (1964), discussed at note 75 *supra* and accompanying text.

¹⁴³ 6 U.S.C.M.A. 521, 20 C.M.R. 237 (1955).

¹⁴⁴ *Id.* at 530, 20 C.M.R. at 246.

¹⁴⁵ 2 U.S.C.M.A. 482, 9 C.M.R. 112 (1953).

¹⁴⁶ 7 U.S.C.M.A. 270, 22 C.M.R. 60 (1956).

THE DOCTRINE OF WAIVER

question whether an accused waives an erroneous ruling when he is "forced" to testify because of the erroneous admission, the Court pointed out that if an accused testifies to dispute improperly admitted evidence, as opposed to merely corroborating the inadmissible evidence or introducing even more damaging information on the same subject, he might have a complaint on **appeal**.¹⁴⁷

In this area where the accused cures the error by his own act, one may also include the situation where the defense deliberately withholds information relative to possible error—perhaps seeking an advantage—and, in the event the verdict is contrary to its hopes, alleges the error on appeal as having been **prejudicial**.¹⁴⁸ Also, an offshoot of this concept is the situation where the defense induces error and subsequently alleges on appeal that he was prejudiced thereby. Although the Court has consistently stated that self-induced error normally may not be claimed later as the basis for appellate reversal, the Court generally has not applied this rule. In almost all cases, the appellate agencies consider the issue on the merits and if there is a possibility that the accused was prejudiced, waiver will not be **applied**.¹⁴⁹ On the other hand, if no prejudicial error is discovered, the possibility of applying the waiver doctrine in the case frequently is cited as an alternative to the original **determination**.¹⁵⁰

Perhaps if the doctrine as such, particularly in the area of self-induced error, ever could have been expected to decide the case against the accused on its own strength, the situation was presented in *United States v. Brux*.¹⁵¹ In this case, the accused was charged with the murder of a fellow marine upon discovery of the deceased's intimate relations with the wife of the accused. During the trial, the wife testified of the intimate relations, at which time the accused became violent, attacking the prosecutor and causing a sufficiently belligerent disturbance to require ten men to restore order. The defense theory at the trial was insanity. Pursuant to this theory, the defense requested instructions from the law officer to the general effect that the "policeman at the elbow test" ¹⁵² was the standard by which the issue of

¹⁴⁷ *Id.* at 277, 22 C.M.R. at 67.

¹⁴⁸ "See *United States v. Wolfe*, 8 U.S.C.M.A. 247, 24 C.M.R. 57 (1957).

¹⁴⁹ "See *United States v. Jones*, 7 U.S.C.M.A. 623, 23 C.M.R. 87 (1957).

¹⁵⁰ See *United States v. Vanderpool*, 4 U.S.C.M.A. 561, 16 C.M.R. 135 (1954).

¹⁵¹ 15 U.S.C.M.A. 597, 36 C.M.R. 95 (1966).

¹⁵² *Id.* at 599, 36 C.M.R. at 97. This test provides in effect that, if the accused would not have committed the act were immediate detection and apprehension certain, he did not act under an irresistible impulse. The Court previously had held in a long line of cases that this test may not be used as a controlling

39 MILITARY LAW REVIEW

insanity was to be determined. This erroneous instruction was given by the law officer. Appellate defense counsel assigned the erroneous instruction as error. The Court of Military Appeals declined to invoke waiver, holding that under the circumstances it would be manifestly improper to leave untouched the issue of insanity, undetermined under the correct standard.¹⁵³

It would seem that a strong position could be made for the proposition that the correct standard of mental responsibility hardly could have benefited the accused to the extent that the erroneous one tailored by the defense could be envisioned to benefit the accused at the time of the trial under the circumstances of the case. If it is borne in mind that the accused, in the solemn and authoritative atmosphere of the courtroom and in the presence of the court members, spontaneously and indicative of irresistibility became activated into an extremely violent and belligerent person, the greatest opportunity for a successful defense might well have lain with the incorrect standard. Certainly, it was, at a minimum, a reasonable and defensible trial tactic by the defense which presumably would pass the federal standard of waiver of deliberate bypass set out in *Fay v. Noia*.¹⁵⁴ The overriding motivation in the nonapplication of waiver under these circumstances may well have been to avoid an association of the Court with the concept of affirming the conviction of an individual pursuant to an erroneous instruction on the applicable law. However, even if nonapplication of waiver was the appropriate answer, from a doctrinal standpoint, waiver would have been more appropriately denied under the concept the Court asserted by way of dicta in *United States v. Stringer*.¹⁵⁵ There, it was stated that the Court could consider claimed error which "would otherwise 'seriously affect the fairness, integrity, or public reputation of judicial proceedings.'" ¹⁵⁶ A suggestion in *Brux*, by using the phrase "manifestly improper," ¹⁵⁷ that waiver would result in a manifest miscarriage of justice appears to create doctrinal problems. Without considering the decision in the *Brux* case—which may be an anomaly in the application of the manifest miscarriage of justice concept of waiver—it generally may

reference on mental responsibility. See *United States v. Hacker*, 15 U.S.C.M.A. 419, 35 C.M.R. 391 (1965).

¹⁵³ 15 U.S.C.M.A. at 602, 36 C.M.R. at 100.

¹⁵⁴ 372 U.S. 391 (1963); see text accompanying note 40 *supra*.

¹⁵⁵ 4 U.S.C.M.A. 494, 16 C.M.R. 68 (1954).

¹⁵⁶ *Id.* at 498, 16 C.M.R. at 72.

¹⁵⁷ *United States v. Brux*, 15 U.S.C.M.A. 597, 602, 36 C.M.R. 95, 100 (1966).

THE DOCTRINE OF WAIVER

be concluded that the concept of manifest miscarriage of justice means no more than a showing from the record that the error or right foreborne by the defense would result in possible prejudice. Hence, in *United States v. Mickel*,¹⁵⁸ in considering a failure to object at the trial, the Court commented: "In the absence of any possibility of harm, what reason justifies reversal of the accused's conviction?"¹⁵⁹ In addition, there appears to be no distinction as to whether the alleged error relates specifically to an essential element of the offense or to less significant matters. Thus, a failure of the defense to object to improper argument by the trial counsel may result in sufficient prejudice to preclude the application of waiver.¹⁶⁰

3. Recordation.

Significantly relevant to the attention devoted to the principal elements of the doctrine of waiver defined in *Masusock*¹⁶¹ is the concept of recordation of the circumstances surrounding an allegation of waiver. One of the underlying reasons cited by the Court in *Masusock* for requiring appropriate objection at the trial level was the need for sufficient information on the record of trial adequately to review the matter in issue. In addition, the questions of knowledgeable waiver and the degree of error which precludes application of waiver manifestly suggest that recordation is necessary, particularly since the burden of proof is on the party alleging the waiver.¹⁶² Thus, in many cases, non-recordation of the sum of the circumstances surrounding the forbearance of a right would be tantamount to a resignation to recontest the issue at the appellate review. As a practical matter, since the law officer and the trial counsel have a duty to preserve the record of trial from error and have an inherent interest in preserving an adjudged conviction from reversal on appeal, the burden of recordation rests with them. The problem of recognizing when the defense is waiving a right in the first instance may often be quite difficult at the trial level, particularly in the heat of courtroom battle. The fact that such a waiver frequently involves no more than mere silence by the defense may suggest that not infrequently it is an almost impossible burden. Then again, even at that point, the prospect of ascertaining from the

¹⁵⁸ 9 U.S.C.M.A. 324, 26 C.M.R. 104 (1958).

¹⁵⁹ *Id.* at 327, 26 C.M.R. at 107.

¹⁶⁰ "See *United States v. Skees*, 10 U.S.C.M.A. 285, 27 C.M.R. 359 (1959).

¹⁶¹ *United States v. Masusock*, 1 U.S.C.M.A. 32, 1 C.M.R. 32 (1951), discussed at note 104 *supra* and accompanying text.

¹⁶² See *United States v. Brown*, 10 U.S.C.M.A. 498, 28 C.M.R. 64 (1959).

39 MILITARY LAW REVIEW

defense sufficient information regarding every trial decision that is made is sufficiently impractical, in view of the trial court inefficiency such action would spawn, as to merit little consideration. The practical solution to the problem necessarily must be less than completely satisfactory from the viewpoints both of full courtroom efficiency and of protecting the case from attack by the defense on appellate review. In those areas where the Manual prescribes waiver in the absence of objection, recordation of course is not necessary, since appellate agencies generally are inclined to support the Manual view.¹⁶³ However, in the area of constitutional or fundamental rights, where forbearance by the defense is relatively easy to recognize, where the opportunity for prejudice to the accused is increased greatly, and particularly when failure to assert a right appears to be disadvantageous to the accused, a rational concern for the integrity of the record would suggest an urgent emphasis on recordation.

V. CONCLUSION AND RECOMMENDATIONS

Since the absence of recordation properly so-called at the trial level made it practically impossible to appeal errors relating to any but those fundamental rights which can be described as structural members of the judicial process, it is not difficult to understand that the doctrine of waiver in criminal trials never obtained a footing at common law. Despite the fact that even in relation to these fundamental rights there was no right as such to appeal on the law or the facts at common law, the concept of nonwaiver, as far as there applicable, had a marked influence on the treatment of these rights in the American Colonies. However, this influence, rather than having an absolute exclusionary effect, resulted in an unqualified reluctance on the part of the courts to apply the doctrine. In relation to ordinary trial decisions, however, the absence of any substantial contentions to the contrary suggests that no such reluctance applied to them. The reluctant attitude toward applying waiver in the colonial and closely following era in the states is found to have permeated the treatment the federal courts gave to fundamental and constitutional rights. Here, as in the colonies, the issue of waiver of these rights as a general, all-inclusive concept was largely unresolved, since the courts addressed themselves to each individual right in the context within which it was raised on a case-by-case basis. As federal case law developed and the appli-

¹⁶³ See note 102 *supra* and accompanying text,

THE DOCTRINE OF WAIVER

cation of the doctrine to fundamental rights, individually treated, expanded, the Supreme Court, through its decisions in *Johnson v. Zerbst*, *Fay v. Noia*, and *Henry v. Mississippi*, developed a strong rule regarding application of the doctrine to constitutional and fundamental rights. This rule basically declares that waiver will not be applied unless there is such an understanding and knowledgeable relinquishment or abandonment of a right or privilege that the reasons therefor can be fairly described as the deliberate bypassing of state procedures. In addition, it became clear that the state interest in the procedural rule waived must be valid and not have been satisfied in some other way and, in some instances, that the accused must have participated personally therein. Even under these very circumscribed conditions, a federal court is not bound to apply the doctrine, and in the presence of "extraordinary circumstances," the federal courts will not apply the doctrine. This conservative approach basically is generated by the concept that the preservation of fundamental and constitutional rights of an accused are paramount in relation to the state interest. In addition, this rule allows for a convenient means of protecting an accused from the errors of his counsel. The development of the doctrine indicates a tendency of the federal courts towards a view that waiver will be applied to these fundamental and constitutional rights generally only under circumstances as favorable to the accused as the circumstances held by the Supreme Court, in *Miranda v. Arizona*, to be required with regard to in-custody interrogation.

The development of the doctrine under the *Uniform Code of Military Justice* reflects a judicial recognition of the historical distinction between rights of a fundamental character and others. This distinction became merged, however, in the treatment of these fundamental and constitutional rights under the same definition of waiver as applied to rights regarding admissibility of evidence in general, set out by the Court of Military Appeals in *United States v. Masusock*. The rule that waiver will be applied, in the absence of objection, only if the defense understood its right to object and provided the application does not work a manifest miscarriage of justice, was restrictively applied in favor of the defense, except in those areas where the Manual had provided otherwise. The nonapplication of the doctrine in practice, at least to the extent that it did not become the deciding factor in any significant number of cases, has vitiated the need in the military for the conservative principles of waiver

39 MILITARY LAW REVIEW

enunciated in *Fay v. Noia* and *Henry v. Mississippi*. In addition, the restrictive application of the doctrine in the federal courts has its counterpart in the application of the military rule not only regarding fundamental rights but also regarding admissibility of evidence rights in general.

It may be said that the nonapplication of the doctrine of waiver, in practice, particularly in relation to admissibility of evidence, tends to encourage or promote some of the objectives which the rule was designed to prevent, such as careless trial representation and piecemeal litigation of a case in several forums. A defense counsel theoretically may relax at the trial, confident that any error he makes, if possibly prejudicial to his client, will be a basis for successful appeal and indeed deliberately may fail to make objection in order to lay a foundation for reversal on appeal. The proposition that the appellate judiciary tribunals will not countenance such motivated actions presupposes that all the circumstances, including those evidencing motivation, appear on the record. This prerequisite of proof in waiver situations, which situations frequently are most difficult to recognize in the first instance, creates an almost impossible burden on the party alleging waiver. In addition, full recordation of all possible waiver situations by any of the trial court functionaries is impractical for other reasons. Full recordation frequently would require soliciting information from the defense counsel relative to his knowledge of alternate courses of action available to him and the possible advantages and disadvantages of each. A logical extension of this might, in some cases, even require a disclosure of the work product of the prosecutor in situations where the study of a legal principle suggests more than a single theory of application to a given case. The adverse flavor the difficulties inherent in full recordation present on the traditional adversary system of trial, on the principle of independent management of the case by the defense, on the jury effect that the defense may seek by forbearing to assert certain rights, and on the confidence of the accused in his attorney militates against the employment of extensive recordation as a panacea for careless trial representation or deliberate bypass of evidentiary rights.

From the viewpoint of the welfare of the accused, the general tendency of nonapplication of waiver may be said to protect him from loss of rights and from error of his counsel that may be prejudicial and, sometimes, as in *United States v. Brux*, to give

THE DOCTRINE OF WAIVER

him a double opportunity to obtain an acquittal.

From the viewpoint of judicial efficiency—the object which the rule was to promote—the doctrine of waiver in the federal courts, as applied to fundamental and constitutional rights, and in the military system, as applied to fundamental and constitutional rights as well as to admissibility of evidence except where the Manual specifically has provided otherwise, may be said to be a tiger without teeth. The value of waiver, if any, lies not in its application but in the threat that it may be applied in any given case. On the other hand, the element of certainty the law ideally should have in this area and the impossible burden the problem of recordation places on trial personnel seem to outweigh the value of even that relatively remote threat.

It is suggested that a judicial re-evaluation of the rule, particularly in the military so far as it is applied to rights associated with admissibility of evidence generally, is in order and should be sought by the various military agencies capable of exerting persuasive influence on the military judicial tribunals. In the meantime, specific emphasis on recordation, particularly in the area of constitutional or fundamental rights and in those areas where a waiver situation is relatively easy to recognize and the opportunity for prejudice to the accused is great, is the rational, albeit unsatisfactory, course to be followed by trial court functionaries.

CLAIMS OF SUBCONTRACTORS BEFORE THE ARMED SERVICES BOARD OF CONTRACT APPEALS*

By Major Leonard G. Crowley**

This article is a study of the methods available to a subcontractor in prosecuting before the Armed Services Board of Contract Appeals a claim based upon direct governmental action. The author discusses the roles of both the subcontractor and the prime contractor in these appeals and the judicial decisions pertinent thereto. He concludes that the appeal procedure presently available to the subcontractor is adequate.

I. INTRODUCTION

During recent Senate hearings on the operation of federal agency boards of contract appeals, representatives of industry and civilian counsel who considered the subject were unanimous in urging the adoption of procedures by the boards which would allow direct appeals by subcontractors under government prime contracts for claims generated by governmental action.¹ The representatives of federal agencies were just as adamant that no such right of direct appeal should be given.² The problems of subcontractors—who are very often small businesses, though not necessarily so³—received considerable attention from the wit-

* This article was adapted from a thesis presented to The Judge Advocate General's School, **U.S.** Army, Charlottesville, Virginia, while the author was a member of the Fifteenth Advanced Course. The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

** JAGC, **U.S.** Army; Judge Advocate, Headquarters, Fourth **U.S.** Army, Fort Sam Houston, Texas; **B.L.L.**, 1957, Boston University School of Law; admitted to practice before the bars of the State of Massachusetts and the United States Court of Military Appeals.

¹ See *Hearings on Operation and Effectiveness of Government Boards of Contract Appeals Before a Subcommittee of the Senate Select Committee on Small Business*, 89th Cong., 2d Sess. at 95, 100, 109, 126, 141-42 (1966).

² See *id.* at 12, 47, 77.

³ It is assumed by many people unfamiliar with government procurement that subcontractors are necessarily small businesses. Two of the cases discussed subsequently concern such industrial giants as Chrysler Corporation and General Motors Corporation as subcontractors. A small business concern is defined in Armed Services Procurement Reg. § 1-701.1 (Rev. No. 23, 1 June 1967) [hereafter cited as ASPR].

nesses during the hearings. The reason for this attention is readily seen when it is realized what tremendous sums of money are involved today in government procurement. During the fiscal year ending 30 June 1965, the Department of Defense obligated over 27 billion contract dollars.⁴ A great deal of this sum was distributed by prime contractors to subcontractors.

The purpose of this paper is to analyze what relief is presently available before the Armed Services Board of Contract Appeals [hereafter referred to as the "ASBCA" or "the Board"] to subcontractors under government prime contracts for claims arising from acts of the Government and, in conjunction therewith, to examine the necessity for further relief, particularly in regard to granting subcontractors a right of direct appeal to the ASBCA.

The Armed Services Procurement Regulation (ASPR), which is promulgated under the authority of the Armed Services Procurement Act, as amended⁵—the basic statutory law covering defense procurement—contains numerous provisions on subcontracts. ASPR contains over 75 paragraphs, including one entire section,⁶ which apply to subcontracting transactions by name and many others which may have application. In connection with the Federal Government's interest in small business and labor surplus area concerns, ASPR requires the inclusion in all prime contracts in excess of \$5,000 a clause which requires the prime contractor to subcontract to the fullest possible extent.⁷ Prime contracts in excess of \$500,000 require the prime contractor to undertake a number of specific responsibilities, including the establishment of a subcontracting program, and the inclusion of similar requirements in all subcontracts in excess of \$500,000.⁸ Cost-reimbursement type contracts, which account for a large share of the procurement dollars spent, contain a number of requirements placed on prime contractors in relation to subcontracting.⁹ Depending upon the amount or type of subcontract contemplated, the approval of the government contracting officer may be required.¹⁰ The insertion in the subcontract of

⁴ *Hearings on Operation and Effectiveness of Government Boards of Contract Appeals*, *supra* note 1, at 4.

⁵ 10 U.S.C. §§ 2202, 2301-14 (1964).

⁶ ASPR § XXIII.

⁷ ASPR § 1-707.3(a) (Rev. No. 12, 1 Aug. 1965); ASPR § 1-805.3(a) (Rev. No. 23, 1 June 1967).

⁸ ASPR § 1-707.3(b) (Rev. No. 12, 1 Aug. 1965); ASPR § 1-805.3(b) (Rev. No. 23, 1 June 1967).

⁹ See generally ASPR § VII, pts. 2, 4.

¹⁰ See ASPR § 23-201 (Rev. No. 20, 1 Dec. 1966).

certain conditions may also be required.¹¹ Subcontractors are also subject to control by government agents in the form of audits, inspections, instructions, superintendence, and termination settlements.¹²

It is appropriate at this point to define what is meant by a "subcontract" and a "subcontractor" in this article. Neither the Armed Services Procurement Act nor ASPR contain meaningful general definitions of the terms.¹³ A "subcontract" may be defined as "any contract, agreement, or purchase order . . . entered into to perform any work, or to make or furnish any material to the extent that such work or material is required for the performance of any one or more prime contracts or of any one or more other subcontracts. . . ." ¹⁴ A "subcontractor" is "any holder of one or more subcontracts [under a prime contract or other subcontract]." ¹⁵ Therefore, as the term "subcontractor" is used in this article, it encompasses what is generally known as a subcontractor in the building trades as well as a materialman. The term also includes a party providing an integral unit for the prime contract, as well as suppliers of raw materials and other items.

It would be appropriate here to mention a few examples of the types of governmental action which give rise to subcontract problems. Some of the more common examples are changes in the specifications ordered by the Government which may add, delete, or change the work required, delays in making the site available, delays in furnishing government owned property or models for use in the work, and suspensions of work for various reasons, including time to decide on what changes to make. Also, conditions at the site may differ from what the Government has led the contractor to believe, as a result of core borings and other tests furnished to the contractor by the Government. Today a

¹¹ See ASPR § 7-602.37 (Rev. No. 9, 29 Jan. 1965), for a listing of some of the clauses which a prime contractor of a fixed-price construction contract must include in his subcontracts.

¹² See, e.g., ASPR §§ 7-103.5 (Rev. No. 10, 1 Apr. 1965), 7-104.41 (Rev. No. 14, 1 Dec. 1965), 7-104.42 (Rev. No. 17, 1 June 1966), 7-203.5 (Rev. No. 17, 1 June 1966), 7-203.8 (Rev. No. 20, 1 Dec. 1966), 7-402.5 (Rev. No. 6, 1 July 1964), 7-402.8 (Rev. No. 20, 1 Dec. 1966), 7-602.37 (Rev. No. 9, 29 Jan. 1965), 8-208.4 (Rev. No. 16, 1 Apr. 1966).

¹³ ASPR § 8-101.24 (Rev. No. 8, 1 Nov. 1964), contains a definition of "subcontract" for use in connection with ASPR § VIII, Termination of Contracts. ASPR § 7-103.1 (Rev. No. 10, 1 Apr. 1965) also contains a definition of "subcontract."

¹⁴ Contract Settlement Act of 1944 § 3(b), 41 U.S.C. § 103(b) (1964).

¹⁵ Id.

39 MILITARY LAW REVIEW

great many of the governmental acts which affect the subcontractor are covered by specific clauses in the prime contract which authorize the Government to do such acts and provide for an equitable adjustment in the prime contract on account of such acts.¹⁶

All prime contracts are required by **ASPR** to contain what is commonly called a "Disputes" clause.¹⁷ This clause is the vehicle by which the prime contractor may appeal a decision of the government contracting officer, who is responsible for the administration of the contract, to the head of the government agency or his representative, the agency board of contract appeals.¹⁸ The clause provides that disputes concerning questions of fact that arise under the contract and which are not disposed of by agreement are to be decided by the contracting officer in writing. This may be appealed to the head of the agency by the contractor within **30** days of receipt of the decision for determination by the head of the agency or his representative for the determination of such appeals.¹⁹ The contract clauses dealing with changes, changed conditions, suspension of work and delays, and government furnished property provide that inability of the parties to reach an equitable adjustment because of such actions shall be considered a dispute concerning a question of fact within the meaning of the "Disputes" clause of the contract.²⁰

A subcontractor does not have the right to obtain a decision of the contracting officer or the right of direct appeal to the agency board of contract appeals. In fact, **ASPR** prohibits a government contracting officer from approving a subcontract which contains such a provision.²¹ A subcontract which purported to give such a right and which was not approved or otherwise authorized by the contracting officer would not, of course, give such a right without some affirmative action on the part of the Government." **ASPR** does provide, however, that a subcontract

¹⁶ See, e.g., **ASPR** §§ 7-103.2 (Rev. No. 10, 1 Apr. 1965), 7-103.24 (Rev. No. 18, 1 Aug. 1966), 7-203.2 (Rev. No. 22, 3 Apr. 1967), 7-602.3 (Rev. No. 9, 29 Jan. 1965), 7-602.4 (Rev. No. 9, 29 Jan. 1965), 7-602.46 (Rev. No. 20, 1 Dec. 1966), 13-702 (Rev. No. 22, 3 Apr. 1967), 13-703 (Rev. No. 14, 1 Dec. 1965).

"See, e.g., **ASPR** §§ 7-103.12 (Rev. No. 16, 1 Apr. 1966), 7-203.12 (Rev. No. 20, 1 Dec. 1966), 7-602.6 (Rev. No. 9, 29 Jan. 1965).

"See, e.g., **ASPR** §§ 7-103.12 (Rev. No. 16, 1 Apr. 1966), 7-602.6 (Rev. No. 9, 29 Jan. 1965).

¹⁹ See *id.*

²⁰ See generally **ASPR** § VII.

²¹ **ASPR** § 23-203(a) (Rev. No. 20, 1 Dec. 1966).

"Dorne & Margolin, Inc., ASBCA No. 9777, 10 Aug. 1964, 1964 B.C.A. ¶ 4372; Remler Co., ASBCA No. 5295, 4 Sept. 1959; 59-2 B.C.A. ¶ 2336 (1959), reconsideration denied, 13 Apr. 1960, 60-1 B.C.A. ¶ 2612 (1960).

CLAIMS OF SUBCONTRACTORS

should not be disapproved solely because it provides for the subcontractor to appeal *in the name* of the prime contractor under the prime contract's "Disputes" clause, if the subcontractor is affected by a dispute arising under the prime contract.²³

This article is primarily concerned with the right of a subcontractor under a government prime contract to seek relief for alleged losses, expenses, damages, and extra costs caused by acts of the Government under the prime contract. Its scope is limited to the processing of these subcontractor claims, either by the prime contractor on behalf of the subcontractor or directly by the subcontractor before the ASBCA and those judicial decisions which bear upon the subject.²⁴ No attempt will be made to go into the rights that a subcontractor may have under the Miller Act²⁵ or for breach of contract against the prime contractor.²⁶ Also, congressional reference cases and General Accounting Office claims are not covered.²⁷

Prior to discussing the pertinent court decisions which bear on this subject, it is well to keep in mind the fact that many of the situations arising in the cases were, until recently, considered breaches of contract but are now covered by the specific contract clauses mentioned above. By the inclusion of such provisions in the contract, the prime contractor has been given an administrative remedy where in the past he has had to sue for breach of contract in order to get any relief from the government action no matter how justified his claim.

11. JUDICIAL DECISIONS

Before looking at the administrative handling of subcontractors' claims, it will be beneficial to see how the courts have handled these claims when they have had the occasion to do so, as the Board follows judicial precedents when possible.²⁸ The

²³ ASPR § 23-203(b) (Rev. No. 20, 1 Dec. 1966).

²⁴ For a discussion of the functions of the ASBCA see Shedd, *Disputes and Appeals: The Armed Services Board of Contract Appeals*, 29 LAW & CONTEMP. PROB. 39 (1964).

²⁵ 40 U.S.C. §§ 270a-d (1964).

²⁶ For an informative article on subcontractor suits against prime contractors under the Miller Act and other breaches of contract see Creyke & Lewis, *Construction Subcontract Claims Procedures*, THE GOVERNMENT CONTRACTOR, BRIEFING PAPERS No. 65-3 (1965).

²⁷ For a discussion of congressional reference cases and G.A.O. claims see Penne, *Legal Remedies of the Government Subcontractor*, 32 S. CAL. L. REV. 1 (1958); Welch, *G.A.O. and Subcontractors Claims Against the Government*, 16 FED. B. J. 240 (1956).

²⁸ See, e.g., Chas. H. Tompkins Co., ASBCA No. 2661, 25 Nov. 1955; General Installation Co., ASBCA No. 2061, 14 Dec. 1954, 6 C.C.F. ¶ 61,612 (1954).

39 MILITARY LAW REVIEW

United States, as a sovereign, is not subject to suit except so far as it has consented to be sued.²⁹ Congress has consented to suits sounding in contract under the Tucker Act.³⁰ Such suits must be based upon an express or implied contract,³¹ and the implied contract must be implied in fact.³²

A. DIRECT SUITS BY THE SUBCONTRACTOR

Ordinarily there is no contract relationship between the Government and the subcontractor, notwithstanding the great amount of control the Government may exercise over the subcontractor directly or through the prime contractor.³³ Before a subcontractor may sue the United States directly there must be an express or implied contract between them—privity of contract.³⁴ In a few instances the courts have found a basis upon which the subcontractor might bring a direct action against the Government. If the prime contractor acts as the agent of the Government, the subcontractor does, in fact, have privity with the Government and may bring a direct action against the Government.³⁵ However, this agency arrangement is not used by the Department of Defense as a standard procedure.³⁶

Privity was also found where the Government, upon termination of the prime contract, took material owned by a subcontractor located at the work site.³⁷ The court held that there arose an implied contract between the Government and the subcontractor to pay for the material taken.³⁸ Likewise, a subcontractor has been held to be a third party beneficiary of a contract in certain instances.³⁹ One such instance occurred under

²⁹ *United States v. Shaw*, 309 U.S. 495 (1940); *Kansas v. United States*, 204 U.S. 331 (1907).

³⁰ 24 Stat. 505 (1887), 28 U.S.C. §§ 1346(a)(2), 1491 (1964).

³¹ See *id.*

³² See *Goodyear Co. v. United States*, 276 U.S. 287 (1928); *United States v. Minnesota Investment Co.*, 271 U.S. 212 (1926); *Merritt v. United States*, 267 U.S. 338 (1925).

³³ See *United States v. Blair*, 321 U.S. 730 (1944); *Merritt v. United States*, 267 U.S. 338 (1925).

³⁴ See *id.*

³⁵ Cf. *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110 (1954); *Western Union Tel. Co. v. United States*, 66 Ct. Cl. 38 (1928).

³⁶ See *Sass, Subcontractors' Claims Against the Government*, 16 *FED. B. J.* 232 (1956); *Wesselink & Milde, Subcontractors Under Government Contracts*, in *SOUTHWESTERN LEGAL FOUNDATION, GOVERNMENT CONTRACTS AND PROCUREMENT*, 172-73 (1962).

³⁷ See *United States v. Georgia Marble Co.*, 106 F.2d 955 (5th Cir. 1939).

³⁸ See *id.* at 957.

³⁹ See *Daniel Hamm Drayage Co. v. Willson*, 178 F.2d 633 (8th Cir. 1949);

CLAIMS OF SUBCONTRACTORS

the Contract Settlement Act of 1944 where the Government assumed the obligations of the prime contractor.⁴⁰

B. *SUITS BY THE PRIME CONTRACTOR ON BEHALF OF THE SUBCONTRACTOR*

For over fifty years—1892 to 1943—the Court of Claims allowed a prime contractor to bring an action on behalf of his subcontractor for losses due to delays caused by acts of the Government, without first determining if the prime contractor was liable to the subcontractor.⁴¹ However, in *Severin v. United States*⁴² the Court of Claims drastically restricted the right of a prime contractor to bring an action on behalf of its subcontractor. This 1943 case involved the construction of a post office at Rochester, New York. Under the terms of the contract, the Government was required to furnish the contractor certain models to be used in making the ornamental stonework. Receipt of the models was delayed; therefore, after finishing the work on the building, the contractor presented claims for alleged losses due to the delays occasioned by late delivery of the models. The claims included additional overhead for the prime contractor; and, on behalf of the stonecutting subcontractor, claims for additional labor costs, overhead, and rental of idled equipment. The subcontract between the prime contractor and subcontractor contained the following exculpatory provision:

21st. The Contractor or Subcontractor shall not in any event be held responsible for any loss, damate (sic), detention or delay caused by the Owner or any other Subcontractor upon the building; or delays in transportation, fire, strikes, lockouts, civil or military authority, or by insurrection or riot, or by any other cause beyond the control of Contractor or Subcontractor, or in any event for consequential damages."

The court found that the late delivery of the models was not justified and constituted a breach of contract by the Government. It also found that the late delivery materially affected the work, delayed completion of the building, and caused damages to the

Maneely v. United States, 68 Ct. Cl. 623, 629 (1929); cf. *Corum v. United States*, 81 F. Supp. 728, 731 (1949).

⁴⁰ 41 U.S.C. §§ 101-25 (1964). For a discussion of Government practice during WW II see Nemmers, *The Problem of Government Liability to Subcontractors Under Terminated CPFF Prime Contracts — The Third Party Beneficiary Theory*, 31 VA. L. REV. 161 (1944).

⁴¹ Beginning with *Stout v. United States*, 27 Ct. Cl. 385 (1892), and extending to *Consolidated Eng'r Co. v. United States*, 98 Ct. Cl. 256 (1943).

⁴² 99 Ct. Cl. 435 (1943), cert. denied, 322 U.S. 733 (1944).

⁴³ *Id.* at 443.

39 MILITARY LAW REVIEW

prime contractor and subcontractor. The court held, considering the subcontractor as the real party in interest, that the subcontractor could not sue the Government because there was no privity of contract, and that the subcontractor could not assign to the prime contractor any claim it might have against the Government because of the statute prohibiting assignments of claims.⁴⁴ Then considering the prime contractor as the real party in interest, the court, while allowing the prime contractor to recover its extra overhead costs which were, in fact, based upon the subcontractor's losses, held that the subcontractor's losses were not recoverable by the prime contractor on behalf of the subcontractor. In denying recovery, the court speaking through Judge Madden stated:

Plaintiffs therefore had the burden of proving, not that someone suffered actual damages from the defendant's breach of contract, but that they, plaintiffs, suffered actual damages. If plaintiffs had proved that they, in the performance of their contract with the Government became liable to their subcontractor for the damages which the latter suffered, that liability, though not yet satisfied by payment, might well constitute actual damages to plaintiffs, and sustain their suit. Here, however, the proof shows the opposite. . . . [P]laintiffs, effectively so far as we are advised, protected themselves from any damage by way of liability over to the subcontractor for such breaches of contract by the Government as the one which occurred here.⁴⁵

In a sharply worded dissent Chief Justice Whaley said:

We must bear in mind that general contractors usually sublet specialized work like plumbing and electrical installation to subcontractors. The effect of the majority opinion would be to compel such subcontractors, and they are legion in numbers, to sue in their own names, which they could not do for lack of privity with the United States. The anomalous situation has never been recognized by this court in all its history. And the majority opinion cites no case in the Supreme Court in which subcontractors have been held to be assignors of claims against the United States, merely because they were unfortunate enough to be subcontractors.

The subcontractor of plaintiff agreed in his contract not to hold the contractor for "loss, damage, detention or delay caused by the owner."

. . . The defendant was not a party to the subcontract. No consideration has been paid by the defendant for the protection given the contractor in the subcontract and without it the defendant cannot avail itself of this defense."

The Chief Justice concluded by saying that it was a travesty of

⁴⁴ REV. STAT. § 3477 (1875), 31 U.S.C. § 203 (1964).

⁴⁵ *Severin v. United States*, 99 Ct. Cl. 435, 443 (1943).

⁴⁶ *Id.* at 444-45.

CLAIMS OF SUBCONTRACTORS

justice to allow the prime contractor to recover overhead on losses of the subcontractor, but to deny recovery of the amount claimed on behalf of the subcontractor.

As stated previously, this case marked an abrupt change by the Court of Claims in that it allowed recovery on behalf of a subcontractor by a prime contractor to hinge upon the liability between the parties as to the governmental act complained of. The court, as stated in the opinion, now required the showing of liability by the plaintiff prime contractor to his subcontractor to be founded on actual damages; a suit for nominal damages would not be permitted.⁴⁷ Therefore, the Government had become insulated from claims by reason of the prime contractor's actions with its subcontractor.

The next opportunity the Court of Claims had to review the rule laid down in *Severin* was in *James Stewart & Co. v. United States*.⁴⁸ This case involved a construction contract for the erection of the superstructure of the United States Court House, Foley Square, New York City. The Government breached its contract by delays in furnishing models for the building's columns and in ordering changes in the work. Included in the prime contractor's claim was a claim for increased wages that the electrical subcontractor had to pay as a result of the delays caused by the Government. In denying the claim made on behalf of the subcontractor, the court stated :

However this may be, it is clear plaintiff's subcontractor has no right of action against it by reason of this provision of the contract between them: "and the Sub-contractor further agrees that the allowance of additional time for the completion of the work precludes, satisfies, and cancels any and all other claims by it of whatever nature on account of such delay."

If plaintiff is not liable to its subcontractor for damages for delays, defendant is not liable to plaintiff therefor. *Severin v. United States*, 99 Ct. Cl. 435, 442.⁴⁹

By its decision in *Stewart*, the Court of Claims reaffirmed the proposition in *Severin* that there must be liability by the prime contractor to the subcontractor in order for the prime contractor to recover from the Government on behalf of the subcontractor. In these cases, of course, liability was precluded because of an exculpatory clause in the subcontract.

Between the decisions of *Severin* and *Stewart*, the Supreme

⁴⁷ See *id.* at 443.

⁴⁸ 63 F. Supp. 653 (1946).

⁴⁹ *Id.* at 656.

39 MILITARY LAW REVIEW

Court decided the case of *United States v. Blair*,⁵⁰ which involved a claim by the prime contractor on behalf of a subcontractor for extra labor costs. The claim involved an erroneous requirement imposed by the government superintendent at the job site on the subcontractor to pay a higher wage rate to semi-skilled workers than required.⁵¹ A claim was presented to the government contracting officer by the prime contractor and had been allowed, but it had never been paid. Thereafter, the claim was included in a civil suit. In allowing recovery by the prime contractor on behalf of the subcontractor, the Court said:

The court below [Court of Claims] made no finding, and the subcontract as introduced in the record does not expressly indicate, that respondent was liable to the subcontractor for the acts of the Government upon which the claim was based.

Clearly the subcontractor could not recover this claim in a suit against the United States, for there was no express or implied contract between him and the Government. [citation omitted] But it does not follow that respondent is barred from suing for this amount. Respondent was the only person legally bound to perform his contract with the Government and he had the undoubted right to recover from the Government the contract price for the tile terrazzo, marble and soapstone work whether that work was performed personally or through another. This necessarily implies the right to recover extra costs and services wrongfully demanded of respondent under the contract, regardless of whether such costs were incurred or such services were performed personally or through a subcontractor. Respondent's contract with the Government is thus sufficient to sustain an action for extra costs wrongfully demanded under that contract.⁵²

The items of extra cost that arose in *Blair* were apparently compensable under the prime contract and not the result of a breach of contract. The case, therefore, only stands for the proposition that where there are extra costs compensable under a provision of the prime contract, the prime contractor may recover irrespective of its liability to its subcontractor. In other words, the prime contractor gets the benefit of any bargain it has with the subcontractor, and the Government must pay for what it gets. *Severin* was not cited in *Blair*, however, the mention in *Blair* of the absence of a showing that the prime contractor was liable to the subcontractor may have been an indirect reference to *Severin*. If so, this could mean that the crucial test when the prime contractor brings an action on behalf of its

⁵⁰ 321 U.S. 730 (1944).

⁵¹ See *Blair v. United States*, 99 Ct. Cl. 71, 154-55 (1942), the Court of Claims decision in the case.

⁵² *United States v. Blair*, 321 U.S. 730, 737-38 (1944).

CLAIMS OF SUBCONTRACTORS

subcontractor is absence of an exculpatory provision, not proof of liability; nevertheless, the reference could simply mean, which is probably the correct interpretation, that the liability of the prime contractor to the subcontractor is immaterial when the claim is for extra costs pursuant to the contract.

The partnership involved in *Severin* was again before the Court of Claims in 1949, this time represented by its liquidator, Continental Illinois National Bank and Trust Company.⁵³ The action was “to recover alleged damages to the partnership, and to recover on behalf of subcontractors [who had been approved by the Government] losses and damages due to alleged delays and other breaches of the contract by [the Government], and to recover on behalf of the subcontractors for alleged extra work.”⁵⁴ Each subcontract contained an exculpatory provision similar to that in *Severin*. The Government moved that the Commissioner be ordered by the court to omit from his report any findings of fact relating to claims on behalf of subcontractors. The court, citing *Merritt v. United States*,⁵⁵ *Severin*, and *Stewart* and distinguishing *Blair*, reasoned that :

These cases clearly state the principle that where the contractor in his contract with his subcontractor stipulates that the contractor shall not be responsible to such subcontractor for any loss, damage or delay caused by the Government or by any other subcontractor, the contractor may not recover from the Government on behalf of and for the benefit of the subcontractor. The reasoning behind these decisions is that the contractor is not damaged regardless of any hardship suffered by the subcontractor and that the subcontractor may not sue because there is no privity of contract between him and the Government.⁵⁶

The Court went on to point out certain requirements of the prime contract which severely limited the right of the prime contractor to subcontract,⁵⁷ and said that the provisions bordered on creating privity between the subcontractor and the Government, and therefore, “[a] mere statement that a contractual relation did

⁵³ Continental Illinois Nat'l Bank & Trust Co. v. United States, 81 F. Supp. 596 (1949).

⁵⁴ *Id.* at 597.

⁵⁵ 267 U.S. 338 (1925).

⁵⁶ Continental Illinois Nat'l Bank & Trust Co. v. United States, 81 F. Supp. 596, 597 (1949).

⁵⁷ *Id.* at 597-98. The prime contract contained the following provisions concerning subcontracting.

“Sec. 28, SUBCONTRACTS:

“1. (See Art. 26 of the Contract.) The Contractor shall not award any work to any subcontractor without prior written approval of the Contracting Officer, and the terms of all subcontracts shall be subject to the prior approval of the Contracting Officer.

not exist would be ineffective if all elements of such a relation were otherwise present.”⁵⁸ The court granted the Government’s motion, but three weeks later modified its order to permit the Commissioner to hear evidence and report relating to claims on behalf of subcontractors.

Judge Madden, the author of *Severin*, wrote a vigorous dissent in which he said that *Blair* was not only contrary to *Severin* and *Stewart*, cited by the majority, but laid down a better rule. After quoting at length from *Blair*, he said:

This language and decision [*Blair*] seem to me to leave nothing of our doctrine expressed in the *Severin* and *Stewart* cases. And although I wrote the court’s opinion in the *Severin* case, I should be glad to see it overruled, for, upon further consideration, I think it introduces too large an element of the accidental into our decisions in these frequently recurring cases involving subcontractors. I think that in most of the suits involving wrongs committed by the Government agents to the harm of subcontractors, there would be no ground on which the prime contractor would, in fact, be liable to the subcontractor. Yet we consistently allow recovery in such cases, without first trying the hypothetical suit of the subcontractor against the prime contractor. We do not allow recovery because we presume the existence of such liability. Such a presumption would, I think, be contrary to the truth in most cases. In the *Severin* and *Stewart* cases we did not allow recovery, not because the actual situation with reference to liability was different, but because the prime contractor had inserted in his subcontracts, supererogatorily, an express provision relieving him from liability for acts of the Government.

Our distinction, then, depends upon the presence or absence of language in the subcontract which has no other practical utility than the wholly unforeseen one of making it impossible for a subcontractor to be compensated for wrongs suffered at the hands of the Government in the same circumstances in which other subcontractors, absent the language, are given relief. I therefore think that the distinction should be discarded, and the prime contractor treated in all cases as the owner

“2. The Contractor shall be fully responsible to the Government for the acts and omissions of subcontractors and of persons either directly or indirectly employed by them, as he is for acts and omissions of persons directly employed by him.

“3. The Contractor shall cause appropriate provisions to be inserted in all subcontracts relative to the work to bind subcontractors to the contractor by the terms of the General Conditions and other Contract Documents insofar as applicable to the work of subcontractors (particularly without limitation, as provided in Art. 26 of this Contract), and to give the Contractor the same power as regards terminating any subcontract that the Government may exercise over the Contractor under any provisions of the Contract Documents (see particularly Art. 25 and 26 of the Contract and Sec. 41 of these General Conditions).

“4. Nothing contained in the Contract Documents shall create any contractual relation between any subcontractor and the Government.”

⁵⁸*Id.* at 598.

CLAIMS OF SUBCONTRACTORS

of a right to have the Government comply with its contract, which right he holds in trust for those whom he brings into the situation by giving them interest in such compliance as subcontractors. Whether or not in his creation of this trust relation he expressly makes himself exempt from liability for violations by the Government of the contract should have no effect upon his right, as the owner of the rights under the contract, to enforce it for the benefit of those harmed by its breach.⁶⁰

The court here did not discuss the requirement set forth in *Severin* that actual damages must be shown by the plaintiff. In fact, the dissent states flatly that liability by the prime contractor to the subcontractor is presumed unless the subcontract has a contrary provision. Also, by modifying its order the court, as a practical matter, denied the Government's motion and left open the question of the claims on behalf of the subcontractors. Whether or not the dissent by Judge Madden swayed the other members of the court to reconsider their position is pure speculation, but it appears that the court wanted more time to study the problem of the "*Severin* rule" in relation to the decision in *Blair*. Another factor to be considered is that the claim on behalf of the subcontractor included items for extra work. The same type claim as was present in *Blair*. However, the original order of the court did not distinguish between breach of contract delay damages and the claims for extra **work**.

Three years later in a second *Continental* case,⁶¹ the Court of Claims had another opportunity to look at the rule laid down in *Severin*, as the liquidator of the Severin brothers partnership was once again before the court. The suit included a claim for delay damages caused by governmental acts to the prime contractor's excavation subcontractor. The subcontract contained the same exculpatory clause as in the first *Continental* case. In summarily disposing of the claim, the court said:

The Severin Company was, therefore, under no liability to the subcontractor for losses suffered by the latter as a consequence of delays caused by the Government. A majority of the court is of the opinion that, for that reason, the Severin Company could not have recovered, and the plaintiff cannot recover any losses which the subcontractor may have so suffered?

Judge Madden, who wrote the opinion, and one other judge were of the opinion that *Blair* controlled, but they went along with the majority.

⁶⁰*Id.* at 599.

⁶¹*Continental Illinois Nat'l Bank & Trust Co. v. United States*, 101 F. Supp. 755, cert. denied, 343 U.S. 963 (1952).

⁶²*Id.* at 758.

39 MILITARY LAW REVIEW

Finally, in a third *Continental* case⁶² a decision on the merits in the first *Continental* case was handed down by the Court of Claims in 1953. While admitting substantial damages to subcontractors because of government acts, the court through Judge Madden denied recovery of the claims on behalf of subcontractors, citing the second *Continental* case and the fact that the exculpatory subcontract clauses in the two cases were identical.

It had now become firmly established that the rule laid down in *Severin* was not overruled by *Blair*, at least so far as the Court of Claims was concerned. By denying *certiorari* in the second *Continental* case, the Supreme Court forewent an opportunity to clarify the relationship of *Blair* with an exculpatory subcontract clause. No reason can be given for this failure on the part of the Supreme Court to act, but it is possible to distinguish *Severin* and *Blair*. *Severin*, as of now, has only been applied to breach of contract situations where there was an exculpatory clause relieving the prime contractor of liability to the subcontractor. On the other hand, no exculpatory clause was shown in *Blair*, and apparently the claim was for extra labor costs, not a breach of contract claim.

One other point about the first and third *Continental* cases should be mentioned. In the first case, the court stated that the claims by the prime contractor on behalf of the subcontractor included a claim for *extra work*. Nowhere in the opinion of the court on the findings of fact in the third *Continental* case is there any evidence of damages to the subcontractors except as the result of delays. Apparently, the extra work related solely to the delays and was not similar to the extra labor costs in *Blair*.

In 1952 the Court of Claims was faced with a claim for delay damages in *Warren Bros. Roads Co. v. United States*,⁶³ and in this instance the subcontract did not relieve the prime contractor of liability to the subcontractor. One cause of action brought by the prime contractor was a claim on behalf of its hauling subcontractor for delay damages caused by acts of the Government. Citing *Blair*, the court said:

A prime contractor's contract with the Government has been recognized as being sufficient to sustain an action by the prime contractor for extra costs incurred by his subcontractor as a result of wrongful conduct of the Government. . . . [P]laintiff in the instant case is entitled to recover the damages resulting from idleness, irrespective

⁶² *Continental Illinois Nat'l Bank & Trust Co. v. United States*, 113 F. Supp. 97 (1953).

⁶³ 105 F. Supp. 826 (1952).

CLAIMS OF SUBCONTRACTORS

of whether such damages were incurred personally or through a subcontractor.

This conclusion is not contrary to the decisions in [*Severin, Stewart*, and the first and second *Continental* cases]. In these cases the subcontracts contained clauses absolving the prime contractor from liability to the subcontractor for breaches of contract, including breaches by the Government. Wimpy's contract [the Subcontract] with plaintiff does not absolve plaintiff of liability for such damages?'

The Court of Claims has now completely disregarded the statement in *Severin* that the prime contractor must show actual damages. Apparently, the court has assumed that the prime contractor is liable to the subcontractor for government caused delay damages when the subcontract does not contain an exculpatory clause. There is no indication in the *Warren Bros.* case that the prime contractor was liable to the subcontractor when his trucks were idled. In fact, the opposite appears to be the case as the subcontractor worked for a local city to minimize damages on its own. If the prime contractor was liable to pay for the use of the trucks when they were not working, this would be a delay claim of the prime contractor and not one on behalf of the subcontractor. *Warren Bros.*, therefore, stands for the proposition that in a breach of contract situation where there is no exculpatory provision in the subcontract, the prime contractor may recover on behalf of a subcontractor without showing liability to the subcontractor. The citing of *Blair* in the *Warren Bros.* case also appears to be incorrect, as *Blair* did not concern a breach of contract situation. Therefore, as a result of all of the above mentioned cases, the "*Severin* doctrine," as it is called, is limited to breach of contracts where the prime contractor has insulated himself from liability to the subcontractor for delay damages caused by acts of the Government. In breach of contract cases where there is no exculpatory clause and cases involving claims under the contract, the prime contractor may recover on behalf of the subcontractor without showing actual liability to the subcontractor ; in fact, liability will be presumed.

A case decided prior to *Severin* which merits some comment is *Callahan Walker Constr. Co. v. United States*.⁶⁵ Here the Court of Claims allowed a prime contractor to recover on an implied contract theory for work done by a subcontractor when the prime contractor's liability to the subcontractor was contingent upon recovery from the Government. The Government ordered a change under the contract which greatly increased the work to

⁶⁴ *Id.* at 831.

⁶⁵ 95 Ct. Cl. 314, *rev'd on other grounds*, 317 U.S. 56 (1942).

39 MILITARY LAW REVIEW

be performed, and the contractor entered into a subcontract for part of this additional work. The prime contract called for an equitable adjustment in the contract price for any changes, but the contracting officer only allowed compensation for the extra work at the present contract rate. In the subcontract the prime contractor limited his liability to the subcontractor to the prime contract rate and any additional amount that might be recovered in a claim against the Government. Based upon the actions of the contracting officer, the Court of Claims found a breach of contract and allowed recovery on an implied contract basis. In allowing recovery for the reasonable value of the work performed, the court said:

We do not think that the agreement between plaintiff and its subcontractor is any defense. The defendant's liability was contractual. Its implied agreement was to pay the reasonable value of the extra work and if the subcontractor had agreed with plaintiff to do the work for nothing we do not think it would have invalidated this agreement. Certainly it would not have followed that the plaintiff could get nothing for this work from the defendant. The implied contract between defendant and plaintiff and the contract between plaintiff and the subcontractor are two entirely separate contracts, and in our opinion the latter had no effect on the obligations of the former.⁶⁰

The court determined that suit was not for breach of contract, but for recovery under an implied contract in fact for work done. Actual or implied damages to the prime contractor were irrelevant as well as the liability of the prime contractor to the subcontractor. The Government must pay for the **work** it received, and what the prime contractor paid or was liable for the subcontractor was immaterial. If the prime contractor made a good bargain, he made a profit; if not, he suffered a loss. The limitation in the subcontract was only good business. The prime contractor should have recovered even if the subcontract rate was limited to the stated prime contract rate as he was entitled to recover the reasonable value of the work. This case appears to foreshadow *Blair* in some aspects. Also, it appears that the Government attorneys were pressing the court to adopt the breach of contract exculpatory clause idea which reached fruition in *Severin* a year later.

The "*Severin* rule" has been applied to deny recovery where the prime contractor was suing for damages on behalf of a subcontractor—the subcontract contained a release of all liability from the prime contractor to the subcontractor on final payment

⁶⁰ *Id.* at 331.

and final payment has been accepted by the subcontractor without specific reservation of rights against the prime contractor.⁶⁷ The Court of Claims took the position set forth in the second and third *Continental* cases that the prime contractor could not recover for the subcontractor's benefit when the prime contractor was not liable to the subcontractor for the damages caused by the Government. Also, a prime contractor has been denied recovery of a claim on behalf of a subcontractor where the prime contractor had executed an unconditional release of all claims against the Government and had received final payment without protest or reservation.⁶⁸ As the prime contractor released the Government from all liability, no claim existed against the Government by the prime contractor, and it necessarily followed that any claim on behalf of the subcontractor was derived through the prime contractor and would fail.

III. ADMINISTRATIVE APPEALS

A. DIRECT APPEALS BY SUBCONTRACTORS

As previously noted, all government prime contracts contain a "Disputes" clause which allows the contractor to appeal a decision made under some authority in the contract by the government contracting officer to the agency board of contract appeals.⁶⁹ This clause is the usual means by which the board obtains jurisdiction to hear an appeal.⁷⁰ Without such a clause the board will not ordinarily be competent to act on the appeal.⁷¹ Many of the cases which will be discussed below will be concerned with motions by the Government to dismiss an appeal for lack of jurisdiction in the board to hear such an appeal because there is no *relevant* "Disputes" clause. Inasmuch as ASPR presently forbids a government contracting officer to approve a subcontract which gives a subcontractor a right of direct appeal to the ASBCA,⁷² the following discussion may appear to be only of historical interest, but it will be seen from some of the following cases that the

⁶⁷ See *F. H. McGraw & Co. v. United States*, 130 F. Supp. 394 (1955).

⁶⁸ *Pearson, Dickerson, Inc. v. United States*, 115 Ct. Cl. 236, 263 (1950) (dictum).

⁶⁹ ASPR § 7-103.12 (Rev. No. 16, 1 Apr. 1966) contains the "Disputes" clause for supply contracts; ASPR § 7-602.6 (Rev. No. 9, 29 Jan. 1965) contains the "Disputes" clause for construction contracts.

⁷⁰ See *id.*

⁷¹ *General Motors Corp., WD BCA No. 174*, 24 Sept. 1943, 1 C.C.F. 680 (1943).

⁷² ASPR § 23-203(a) (Rev. No. 20, 1 Dec. 1966).

39 MILITARY LAW REVIEW

right to a direct appeal is not always dependent upon a subcontract clause authorizing such.

1. *Subcontract "Disputes" Clauses.*

Although boards of contract appeals have been in existence for many years,⁷³ a convenient place to start the study of administrative appeals concerning subcontractors' claims when the subcontracts in question contained "Disputes" clauses is the case of *Chrysler Corp.*⁷⁴ Chrysler Corporation, a cost-plus-a-fixed-fee [hereafter referred to as CPFF] subcontractor, under a negotiated CPFF prime contract for the procurement of 1,200 bombers brought direct appeals from certain decisions of the contracting officer which disallowed reimbursement for certain items of cost. Chrysler and two other major subcontractors had participated with the prime contractor in the negotiations of the prime contract with the Government and had signed the *prime* contract. The subcontracts bore the same date as the prime contract and were approved by the government contracting officer and the Under Secretary of War. In addition, Chrysler's subcontract was "(consented to" by the Under Secretary and the Chief of the Air Corps. An article of the prime contract provided that the major subcontractors agreed with the Government to carry out all of the conditions required by the article and their subcontracts. The Government also agreed that, to the extent of the work to be performed by the subcontractors, the prime contract was made for the mutual benefit of the Government and the subcontractors. The subcontracts provided that the government contracting officer was to determine allowable costs under the subcontract and that disagreements would be a "dispute" concerning questions of fact. The "Disputes" article of the subcontract provided, in part, as follows:

DISPUTES— Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the Contracting Officer subject to written appeal by the Major Subcontractor or Martin [the prime contractor] within thirty (30) days to the head of the department concerned or his duly authorized representative. . . .⁷⁵

The prime contract and major subcontracts also placed minimum responsibility on the prime contractor in the areas of audits of

⁷³ For a history of the ASBCA and its predecessor boards, see Shedd, *supra* note 24.

⁷⁴ WD BCA Nos. 39, 47, 48, 73, 79, 4 Feb. 1943, 1 C.C.F. 36 (1943).

⁷⁵ *Id.* at 36.

CLAIMS OF SUBCONTRACTORS

the subcontractors, payments to the subcontractors, and other management functions.

Government counsel moved before the Board to dismiss the appeals by the subcontractor, for among other reasons, because Chrysler was not a proper party under the prime contract, being a subcontractor and not in privity of contract with the Government. In denying the motion the Board stated:

As has been seen from the Findings of Fact, the transaction, in so far as it concerns materials and services to be furnished by appellant, properly may be regarded as one between the Government and appellant, with the Martin-Nebraska Company participating, not as a principal, hardly as an agent, but more nearly as a courier or bailee, for the purpose of passing on to appellant moneys received by the Martin-Nebraska Company from the Government, to be advanced to appellant, or to be paid to it by way of reimbursement for expenditures or in satisfaction of its fixed fee."

And the Board concluded:

The major subcontract with appellant is, therefore, a part of the prime contract, at least to the extent that it is made for the mutual benefit of the Government and appellant, and in so far as it concerns appellant's obligations to the Government to carry out the condition to be performed thereunder by appellant. The right of appeal is incident to those obligations. Certainly appellant cannot be bound to the Government to carry out the terms to be performed by appellant under the major subcontract without having at the same time the right of appeal therein allowed."

A few months after *Chrysler*, the Board denied the right of direct appeal to a subcontractor in the case of *General Motors Corp.*⁷⁶ Again the subcontractor was bringing an appeal from the disallowance of reimbursement for an item of cost. The prime contract and subcontract in this case were almost identical with the ones in *Chrysler*, except that here the subcontract did not contain a "Disputes" clause which authorized a direct appeal in this situation. In granting the Government's motion to dismiss the appeal, the Board reasoned as follows:

Since there is no appeal provision either in the major subcontract or in the prime contract, authorizing appeal by the major subcontractor, there is no authority in this Board . . . to consider this appeal."

Therefore, the Board stated :

It is unfortunate for appellant this procedure made no provisions for

⁷⁶ *Id.* at 37.

⁷⁷ *Id.* at 38.

⁷⁸ WD BCA No. 174, 24 Sept. 1943, 1 C.C.F. 680 (1943).

⁷⁹ *Id.* at 684.

39 MILITARY LAW REVIEW

its appeal from an adverse ruling by the contracting officer. It is bound by such rulings without right of appeal therefrom. The parties made and are bound by their own contract terms. It is not within the jurisdiction of this Board to reform contracts or act as a court of equity.⁸⁰

A few years later in 1948, the Board reaffirmed its *Chrysler* decision in *Smith*.⁸¹ The only element absent in this case from *Chrysler* was that the prime contract, which was classified, was not signed by the subcontractor. Citing *Chrysler*, the Board accepted jurisdiction of the direct appeal by the subcontractor stating as follows:

For security reasons du Pont's prime contract was not shown to any subcontractor. Instead of making the prime contract a part of the subcontract or having the subcontractor sign the prime contract, many of the provisions that would ordinarily appear only in the prime contract were incorporated in the subcontract. The government had a very vital interest in the performance under the subcontract. Counsel for the government did not present any evidence or authority to show that the particular "Disputes" article in the subcontract was inserted without authority. The Board is constrained to find under the particular facts of the case that it has authority to determine the direct appeal of the subcontractor, providing the requirements of the "Disputes" article in the subcontract were satisfied.⁸²

From the above cases, it can be seen that the Board has found *actual* privity of contract between the subcontractor and the Government. True, in *Chrysler* and *General Motors*, the subcontractor signed the prime contract, but this was not so in *Smith*. In all of the cases the Government exercised quite extensive control over the subcontractors. The only real difference appears to be the failure to insert in the subcontract a provision for direct appeal in the *General Motors* case. After *Smith*, it could be stated that a subcontractor could obtain a right of direct appeal if the subcontract contained a provision inserted with Government consent or approval and there was actual privity of contract between the Government and the subcontractor based upon the control exercised by the Government over the subcontractor. In *Smith* actual authority to insert the "Disputes" clause was presumed upon a failure of the Government to show no authority.

In 1956, the Board had before it another direct appeal by a subcontractor in *Richmond Steel Co.*⁸³ This subcontract was under a CPFF prime contract which required prior approval by

⁸⁰ *Id.* at 685.

⁸¹ Army BCA No. 1238, 30 Nov. 1948, 4 C.C.F. 4 60,611 (1948).

⁸² *Id.* at 51,088-89.

⁸³ ASBCA No. 3031, 23 Oct. 1956, 56-2 B.C.A. ¶ 1151 (1956).

CLAIMS OF SUBCONTRACTORS

the contracting officer of all subcontracts in excess of \$2,000, the use of prescribed forms for all subcontracts, and a clause in all subcontracts in excess of \$2,000 that they were assignable to the Government. Apparently in conformity with these provisions and ostensibly at the direction of the contracting officer, the subcontract contained a "Disputes" clause, "specifically tailored," which authorized the contracting officer to make a decision on a dispute under the subcontract and for the subcontractor to have a right of direct appeal to the Board. Under the above provisions, the subcontractor appealed to the Board for additional costs involved in complying with the requirements of government inspections. The Government moved to dismiss the appeal for lack of jurisdiction in the Board to hear the appeal as there was no privity of contract. After quoting a portion of its Charter dealing with the types of appeals the Board is responsible for **hearing**,⁸⁴ setting forth reasons why the Government restricts the right of prime contractors under CPFF contracts to subcontract, citing *Smith and Grand Cent. Aircraft Co.*⁸⁵ as authority for direct appeals by a subcontractor, and commenting on the advisability of a "Disputes" clause if the contract is assigned to the Government, the Board held it had jurisdiction of the appeal, reasoning as follows:

Thus, it appears that, from an operational and administrative point of view, the Armed Services are interested in the administration of some classes of subcontracts almost to the same extent as they are in the administration of prime contracts. . . . Consequently, we are of the view that the phrase, "Armed Services contracts," as used in paragraph four of the Charter creating this Board, . . . was used in the general non-technical sense and embraces contracts incident to defense procurement and not merely those where "privity of contract" exists between the Government and the appellant contractor.

We are not called upon to express a view as to the administrative advisability of incorporating a disputes clause in any class of subcontracts or, if such incorporation is to be made, whether provision should be made for appeal thereunder to this Board rather than an agency within the Armed Services concerned. However, we conclude that we have jurisdiction of the dispute in this case.⁸⁶

⁸⁴ Paragraph 4 of the ASBCA's Charter at the time of the decision in *Richmond Steel* provided that the Board was responsible for hearing appeals: "from decisions on disputed questions by contracting officers or their authorized representatives or by other authorities pursuant to the provisions of Armed Services contracts requiring the decision of appeals by the head of a Department of the Armed Services or his duly authorized representative or board. . . ." ASPR app. A (3 Jan. 1955).

"ASBCA No. 1719, 15 Dec. 1953.

⁸⁶ *Richmond Steel Co.*, ASBCA No. 3051, 23 Oct. 1956, 56-2 B.C.A. ¶ 1151, 3075-76 (1956).

39 MILITARY LAW REVIEW

The opinion is unclear as to the exact basis for the Board's holding. However, it appears that the citation of its authority, as set forth in its Charter, was a means of doing away with the requirement of privity between the subcontractor and the Government when the subcontract has a "Disputes" clause granting a right of appeal to the Board. *Richmond Steel* did not involve the substantial control by the Government as in *Chrysler* and *Smith*. After *Richmond Steel*, a subcontractor may have had the right of direct appeal to the Board if his approved subcontract contained a "Disputes" clause which was inserted at the direction of the contracting officer.

Two years later the Board had the opportunity to re-examine *Richmond Steel* in the case of *Grove-Hendrickson*,⁸⁷ which involved a fixed price subcontract approved by the contracting officer under a CPMF prime contract. The subcontract contained a "Changes" clause and a "Disputes" clause. The "Disputes clause provided that;

[A]ny dispute concerning a question of fact arising under this subcontract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Subcontractor. Within 30 days from the date of receipt of such copy, the Subcontractor may appeal by mailing or otherwise furnishing to the Contracting Officer a written appeal addressed to the Secretary. . . .⁸⁸

The subcontractor appealed from an adverse decision given by the government contracting officer for several claims made by the subcontractor on behalf of lower-tier subcontractors for price adjustments. In holding that it had jurisdiction of the appeal, the Board stated:

The latter clause provided for disputes between the parties [*i.e.*, appellant and Grumman] to be decided by the Government's Contracting Officer . . . and permitting the subcontractor to appeal from adverse decisions to the Secretary of the Navy. In consequence this Board, as the representative of the Secretary of the Navy for appeals, has jurisdiction over the subject appeal, though it may be noted that no issue relating to jurisdiction was raised in this appeal. [Citing *Richmond Steel*.] It may be noted further that questions of reimbursability to the prime contractor of the costs involved were not submitted to the Board in the presentation of this appeal.'

In this case there was a specifically tailored "Disputes" clause in the subcontract, and the subcontract was approved by the government contracting officer. This situation is quite similar to

⁸⁷ ASBCA No. 3600, 28 Oct. 1958, 58-2 B.C.A. ¶ 1985 (1958).

⁸⁸ *Id.* at 8218 n.*.

⁸⁹ *Id.* at 8218-19.

CLAIMS OF SUBCONTRACTORS

Richmond Steel, except that the government contracting officer did not insert the “Disputes” clause here. The “Disputes” clause used the terms “subcontract” and “subcontractor” which left no doubt that the subcontractor was to have a right of direct appeal to the Board, and the contracting officer made a decision on the basis of this clause. The Board seemed to base its jurisdiction to hear the appeal on the subcontract clause alone, therefore, not confusing the opinion as it had in *Richmond Steel* by referring to the Board’s Charter and the benefits to the Government of a “Disputes” clause in subcontracts. Government counsel did not attempt to raise the issue of the Board’s jurisdiction to hear the appeal, but the Board raised the question and disposed of it. Therefore, *Grove-Hendrickson* appeared to make it possible to bring a direct subcontractor appeal if the subcontract contained a “Disputes” clause authorizing such an appeal and the subcontract was approved by the government contracting officer.

Next came the case of *Federal Tel. & Radio Co.*⁹⁰ The appellant was a CPFF subcontractor under a CPFF government prime contract. The subcontract, as originally executed, contained a “Disputes” clause as follows:

12. DISPUTES — (ASPR 7-203.12) (a) Except as otherwise provided in the subcontract, the Seller may appeal any decision of Buyer or the Contracting Officer concerning a question of fact arising under this subcontract, which is not disposed of by agreement, by pursuing [Sic] any right or remedy which Seller may have at law or in equity in a Court of competent jurisdiction?”

The prime contract required approval of the subcontract by the contracting officer, and in approving it, he made an amendment thereto which deleted the “Disputes” clause set forth above and incorporated by reference the standard “Disputes” clause found in ASPR changed as follows:

Where necessary to make the context of the above clauses applicable to this subcontract, the terms “Government”, “Contracting Officer” and equivalent phrases shall mean the Buyer, the term “Contractor” shall mean the Seller, and the term “contract” shall mean this subcontract.⁹²

The subcontractor appealed from a decision by the contracting officer handling the subcontract which denied reimbursement for certain costs of the subcontractor. The claim was apparently never reviewed by the prime contractor or the contracting officer handling the prime contract. The appeal was prosecuted in the

⁹⁰ ASBCA No. 4691, 11 June 1959, 59-1 B.C.A. ¶ 2246 (1959).

⁹¹ *Id.* at 9927.

⁹² *Id.* at 9928.

39 MILITARY LAW REVIEW

subcontractor's name and without the authorization of the prime contractor. In holding that it had jurisdiction of the appeal, the Board reasoned as follows:

If a literal transposition and substitution of the words is made, the meaning would indicate that the appellant could appeal from an adverse decision made by the Buyer [prime contractor] and here the Buyer has never been requested to pass on the claim in question. The Board finds, however, an attempt to phrase an expression of intention to authorize the appellant to appeal to this Board. We will accept that as sufficient and in consonance with our holding in the appeal of *Richmond Steel*. . . , the Board denies the Government's motion to dismiss because of appellant's lack of privity of contract with the Government and will decide the appeal on its merits."

Here the subcontract was directly amended by the government contracting officer by deleting a clause limiting the subcontractor's right to appeal a decision of the prime contractor or the contracting officer to court action only, and adding the standard "Disputes" clause tailored to a subcontract situation. As stated in the Board's opinion, a literal reading of the amended clause only gave the subcontractor a right of appeal from an adverse decision by the prime contractor, and the prime contractor did not make a decision here. The Board held there was an attempt to authorize an appeal to the Board which was sufficient. *Federal Tel.* was a situation where the contracting officer amended the proposed subcontract to add, at most, an ambiguous right to appeal directly a decision of the prime contractor to the Board, and the Board read into the subcontract clause a right of direct appeal to the Board based upon decisions of the contracting officer administering the subcontract. If the assumption that the subcontract authorized appeals to the Board based upon decisions of the prime contractor was correct, and this is not certain, then the holding of the Board appears to be correct. There was no valid reason to require the subcontractor to submit the claim to the prime contractor once the government agent charged with the responsibility of passing on the claim denied it, as it is very doubtful the prime contractor would pay it then.

The Board has now extended *Richmond Steel* by interpreting an ambiguous subcontract "Disputes" clause, inserted by the government contracting officer when approving the subcontract, to be an *apparent* attempt to give a right of direct appeal to the Board. In accordance with the well known canon of contractual interpretation, the contract has been construed against the party

⁹³ *Id.*

CLAIMS OF SUBCONTRACTORS

who wrote it inasmuch as the clause could have been interpreted to give only a right of appeal by the subcontractor to the prime contractor and no more.

Three months after *Federal Tel.*, the Board handed down its decision in *Remler Co.*,⁹⁴ thereby stopping further extension of the *Richmond Steel* rationale. The subcontractor in *Remler* had a CPFF subcontract under a government prime cost-reimbursement contract with Stanford University. The subcontract contained, as an attachment, the complete General Provisions of the prime contract, including the unmodified "Disputes" clause. The subcontract, the form of which was not controlled by the Government, was approved by the government contracting officer without modification or mention of the standard "Disputes" clause contained therein. The subcontractor filed a claim for additional compensation due to alleged changes made by the prime contractor in the subcontract, which claim was denied by the prime contractor and, on indirect referral, by the contracting officer. Also, the prime contractor informed the subcontractor that it would not seek further payment of the claim by the Government. Several years later, the subcontractor met concerning his claim with Navy representatives, who led him to believe that the contracting officer would make a decision on his claim, whereupon the subcontractor sought a direct review of the claim by the contracting offices. However, the contracting officer refused to make a decision on the claim because the administration of the subcontract rested with the prime contractor and there was no basis for action to be taken on the claim. The subcontractor appealed the denial of a decision by the contracting officer to the Board. The Government moved to dismiss the appeal for lack of jurisdiction because the Government neither proscribed nor ratified the insertion of the "Disputes" clause in the subcontract; therefore, its inclusion was without binding effect on the Government to entertain a direct appeal by the subcontractor. At the hearing on the Government's motion to dismiss, representatives of the prime contractor testified that the prime contractor attached the General Provisions of the prime contract to the subcontract for the information of the subcontractor and for whatever binding effect they might have on the subcontractor, and that the prime contractor did not intend or take the position that this required the contracting officer to consider a direct appeal by the subcontractor. In holding that

⁹⁴ ASBCA No. 5295, 4 Sept. 1959, 59-2 B.C.A. ¶ 2336 (1959), *reconsideration denied*, 13 Apr. 1960, 60-1 B.C.A. ¶ 2612 (1960).

39 MILITARY LAW REVIEW

the subcontractor was not entitled to a direct appeal by the subcontract "Disputes" clause and in distinguishing *Richmond Steel* and *Federal Tel.*, the Board stated:

On the basis of all the evidence, this Board cannot construe Government approval of the instant subcontract as permitting, in the absence of evidence of such an intention (as absent here), a direct appeal by the subcontractor under the standard Disputes clause inserted by the prime contractor under the circumstances herein above, particularly where the inclusion in the subcontract of the standard Disputes clause, unmodified in any manner whatsoever, is ambiguous at best in providing for a direct subcontractor appeal and where the clause had never been so construed either by the Government or the prime contractor, or even by Appellant for the first several years the dispute was evolving."

The Board also considered whether or not the Government finally agreed to make a direct decision after the conference with the Navy representatives. Referring to *General Motors* and other cases,⁹⁶ the Board held as follows:

Thus, granting that the Government finally agreed to entertain a direct submission by Appellant (but had, for reasons undisclosed in the record, subsequently chosen not to do so)—such assent does not act to confer jurisdiction on this Board. The record amply discloses that the Government at no time authorized or ratified the prime contractor's inclusion of the standard Disputes clause in Appellant's subcontract, and that the Government's eventual consent to entertain a direct submission by Appellant was without reference to the standard Disputes clause in the subcontract—particularly as the Government had consistently taken the position that the inclusion of the clause in the subcontract was without effect to bind the Government.

In summary, the jurisdiction of the Board in the area here concerned is derivative from a disputes provision which contemplates such appeals to this Board. Since the inclusion of the standard Disputes clause in the subject subcontract was not directed by the Government and the application of the unmodified standard clause, as contained in both the prime contract and in the subcontract, to a subcontract situation is at best doubtful to provide for direct subcontractor appeal and has never herein been so construed by the Government—we have no alternative but to hold that the Board is without jurisdiction to consider a direct appeal by the subject Appellant—subcontractor. Accordingly, the subject appeal is hereby dismissed for lack of jurisdiction?"

One member of the panel hearing the case dissented, pointing

⁹⁵ *Id.* at 10,666 (footnotes omitted).

⁹⁶ *Forest Box & Lumber Co., Inc.*, ASBCA No. 2916, 6 Feb. 1956; *Servel, Inc.*, ASBCA No. 8, 24 Apr. 1950; *The Marine Co.*, Army BCA No. 1846, 17 Aug. 1948, 4 C.C.F. ¶ 60,563 (1948).

⁹⁷ *Remler Co.*, ASBCA No. 5295, 4 Sept. 1959, 59-2 B.C.A. ¶ 2336, at 10,668 (1959) (footnote omitted).

out that the “Changes” article, which was specifically written for the subcontract, referred any disputes under the subcontract to the “Disputes” clause attached by the prime contractor. He felt that the subcontract provisions were not ambiguous and scorned the other panel members for resorting to parol evidence to interpret them.

This decision, at first, appeared to be a retreat from the position taken in *Richmond Steel* and *Federal Tel.* Although the Board based its opinion upon the facts that the Government neither prescribed the subcontract form nor was involved in the insertion of the subcontract “Disputes” clause in it, should not the approval of the subcontract with the clause in it have had the same effect in *Remler* as in *Richmond Steel* and *Federal Tel.*, even if the standard “Disputes” clause was not altered? In each of these three cases the subcontract “Disputes” clause was ambiguous. While it is arguable whether parol evidence should have been introduced to show the intent of the prime contractor in inserting the “Disputes” clause in the subcontract, the basis for denying the direct appeal appears to have been the fact that the parol evidence was uncontroverted by the subcontractor. Did this mean that the Government would be bound by the prime contractor’s intent when the Government has nothing to do with drafting the subcontract? It is doubtful that the Board would so hold if the parol evidence or a provision of the subcontract itself showed an intent on the part of the prime contractor to give a right of direct appeal to the subcontractor. Also, the fact that the subcontractor waited about three years to assert his alleged right under the subcontract may have had a great influence on the Board, as well as the fact the Government never recognized the right. After *Remler*, it appeared that a subcontractor might have a right of direct appeal if a subcontract clause was tailored to grant it and there had been affirmative action on the part of the government’s representative in inserting the “Disputes” clause, as well as approval of the subcontract by the government contracting officer. Nevertheless, the Board would not accept jurisdiction of an appeal except as a right found in the contract.

Six months later in denying the subcontractor’s request for reconsideration,⁹⁸ the Board further distinguished *Remler* from *Grove-Hendrickson*. The Board stated:

In that case, contra to the instant case, the Disputes clause in the

⁹⁸ *Remler Co.*, ASBCA No. 5295, 13 Apr. 1960, 60-1 B.C.A. ¶ 2612 (1960).

39 MILITARY LAW REVIEW

subcontract was specifically "tailor-made" to address itself to the subcontractor situation. Moreover, in that case the Contracting Officer has recognized that the Government had intentionally permitted a right of direct appeal by the subcontractor, and had rendered a final decision on the merits addressed to the direct submission by the subcontractor. Furthermore, the Government on appeal, in recognition of the above, raised no issue to the question of jurisdiction of the Board to entertain the appeal. In the instant case, all these elements as would support Board jurisdiction are noticeably absent.⁹⁹

If the above language is taken at face value, the fact that the government contracting officer makes a decision under the subcontract "Disputes" clause should remove any doubts as to the right of a direct appeal where the subcontract "Disputes" clause may be interpreted to grant a direct appeal. The fact the Government failed to question the jurisdiction of the Board in *Remler* does not, however, appear to be too persuasive, as the Board raised the issue itself in *Grove-Hendrickson*. In denying reconsideration in *Remler*, the Board disposed of a contention by the subcontractor dealing with termination settlements which will be discussed later.

Four years after *Remler*, the ASBCA had another direct appeal by a subcontractor in the case of *Dorne & Margolin, Inc.*¹⁰⁰ The subcontract incorporated a Navy contract form which included the standard "Disputes" clause, modified to substitute the prime contractor for the term "Contracting Officer." The government contracting officer did not approve the subcontract or, apparently, know its terms; he only approved, among other things, the proposal to subcontract with the subcontractor, provided all the required ASPR clauses were included.¹⁰¹ The prime contractor terminated the contract for convenience and then determined the termination claim in accordance with the subcontract's terms. The subcontractor appealed this decision of the prime contractor to the Board. The Government declined to appear, contending that the dispute was solely between the prime contractor and the subcontractor. In dismissing the appeal on its own motion, the Board stated that:

In prescribing the inclusion of certain ASPR provisions it is only fair to assume that he [the contracting officer] meant those required to be in subcontracts The disputes article is not required to be in subcontracts. Indeed the parties even departed from the prescribed form

⁹⁹ *Id.* at 12,819.

¹⁰⁰ ASBCA No. 9777, 10 Aug. 1964, 1964 B.C.A. ¶ 4372.

¹⁰¹ See ASPR § 23-200 (Rev. No. 20, 1 Dec. 1966), which sets forth the requirements for consent to subcontracts.

CLAIMS OF SUBCONTRACTORS

for prime contracts by providing that the term "Contracting Officer" among others, should be deemed to include the prime contractor.

All of these conclusions are confirmed by the Agency's present refusal to recognize our suggested role as an arbitrator in this matter.

This case is thus clearly distinguishable from those in which we have taken jurisdiction of subcontractors' appeals.¹⁰²

A review of the above cases dealing with direct appeals discloses certain salient features. First, in *Chrysler* and *Smith* the Board found privity of contract and a right of direct appeal in the subcontractor when the subcontract contained a "Disputes" clause which gave such right. However, in *General Motors* there was privity but no right of direct appeal and no jurisdiction in the Board to hear a direct appeal when the subcontract did not so provide. Second, in *Richmond Steel*, *Federal Tel.*, and *Grove-Hendrickson* there was no privity of contract, but each subcontract was approved by the contracting officer and had a specifically tailored "Disputes" clause authorizing the right of direct appeal. In two of these cases the "Disputes" clause was inserted by action of the contracting officers, and the contracting officer had taken action to give a decision under the "Disputes" clause of the subcontract. In *Grove-Hendrickson*, the one case where the subcontract clause was apparently not inserted through action of the Government, the Government did not question the Board's jurisdiction to hear the appeal. In *Remler* and *Dorne & Margolin*, the subcontract "Disputes" clauses were not specifically tailored to the subcontract situation, except in *Dorne & Margolin* to change the term "Contracting Officer" to prime contractor, and the Government did not specify the subcontract form. While the subcontract in *Remler* was approved by the contracting officer, it was not in *Dorne & Margolin*. Therefore, in conclusion it may be stated that privity of contract is not necessary to give a subcontractor a right of direct appeal to the ASBCA. A subcontract which has been approved by the contracting officer, which contains a "Disputes" clause specifically tailored to the subcontract situation, and which has either been inserted by the Government or actually been used to give a decision by the contracting officer to the subcontractor will authorize a subcontractor a right of direct appeal to the ASBCA. On the other hand, the Board will not accept jurisdiction of an appeal unless the subcontract so provides, and jurisdiction cannot be conferred on the Board by the Government making a

¹⁰² *Dorne & Margolin, Inc.*, ASBCA No. 9777, 10 Aug. 1964, 1964 B.C.A. ¶ 4372, at 21,121.

39 MILITARY LAW REVIEW

decision outside the provisions of the subcontract which the subcontractor then appeals to the Board.

2. Termination Settlements.

ASPR requires that most prime contracts contain a "Termination for the Convenience of the Government" clause which provides that the Government, if it terminates the prime contract, may require the prime contractor to assign subcontracts under the prime contract to the Government.¹⁰³ Thus, the Government may settle the subcontract termination claims directly with the subcontractor. The "Termination" clause also provides that disputes arising under the termination procedures will be considered as disputes under the "Disputes" clause and handled in that manner. Although the assignment of subcontracts is not resorted to very often, when it is used, the subcontractor may thereby obtain a right of direct appeal to the ASBCA on disputes concerning the subcontractor's termination claim ~ ~ ~

A good case to start an analysis of subcontract termination claims is *Mercury Aircraft Prods., Inc.*¹⁰⁵ This case involved a subcontract for the manufacture of aircraft seats. The subcontract, which was in the form of a purchase order, contained no "Disputes" article, however, it did contain a "Termination" article authorizing the prime contractor to cancel, revise, or suspend the subcontract if the Government cancelled, revised, or suspended the prime contract. If the subcontract was so changed, the settlement for the finished and unfinished work was to be made in accordance with the "formula and regulations established by the Government."¹⁰⁶ The subcontract was terminated by the prime contractor, but the prime contractor and the subcontractor could not agree on a settlement. The subcontractor sought the assistance of the Government in settling its claim, and they

¹⁰³ Subclause (b)(iv) of the "TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (APR. 1966)" clause required by ASPR § 8-701(a) to be included in most fixed-price prime contracts provides that the contractor shall: "(iv) assign to the Government, in the manner, at the times, and to the extent directed by the Contracting Officer, all of the right, title, and interest of the Contractor under the orders and subcontracts so terminated, in which case the Government shall have the right, in its discretion, to settle or pay any or all claims arising out of the termination of such orders and subcontracts."

ASPR § 8-702(a) (Rev. No. 9, 29 Jan, 1965) contains a similar subclause to be included in cost-reimbursed type prime contracts.

¹⁰⁴ ASPR § 8-208.8 (1 Mar. 1963), provides in (a) that the contracting officer will not require the assignment of subcontracts "unless he determines that it is in the best interest of the Government . . ." and in (b) that "[d]irect settlements with subcontractors are not encouraged."

CLAIMS OF SUBCONTRACTORS

agreed to have the Government directly settle the claim (although the subcontractor contended before the Board that it had not so agreed), The Government audited the subcontractor and entered into unsuccessful negotiations with the subcontractor without a representative of the prime contractor being present. The contracting officer then made a unilateral determination of the claim under the provisions of ASPR and notified the subcontractor as follows:

5. You are hereby notified that ASPR 8-520 provides that the Contractor shall have a right of appeal, from any determination made by the Contracting Officer under ASPR 8-520, under the Contract clause entitled "Disputes." Since your contract was not with the Government, it does not contain such a "Disputes" clause, which is the normal basis for appeal to the Secretary of the Air Force's duly authorized representative, the Armed Services Board of Contract Appeals. However, since the Board determines its own jurisdiction, no opinion is given as to the Contractor's right to such an appeal should it desire to appeal from the findings and determination herein before set forth. . . .¹⁰⁷

The subcontractor sent notice of appeal to the Secretary of the Air Force by a telegram, which also disavowed any acceptance of direct settlement with the Government. Looking at Section VIII, ASPR, which was to control the settlement, the Board determined that it had jurisdiction and reasoned that:

[O]ur jurisdiction must be found, if at all, in that stipulation in the telegram of 3 March that "The termination claim will be . . . determined in accordance with and pursuant to the provisions of Section VIII of the Armed Services Procurement Regulation. . . ."

Insofar as here pertinent Section VIII provides that where the parties are unable to agree claims shall be determined in accordance with the Termination Article. . . . Part 7 of that Section has forms of Articles for the termination of contracts for the convenience of the Government. They provide that from such determination "The Contractor shall have the right of appeal, under the clause of this contract entitled 'Disputes.'" That is a standard form elsewhere prescribed in the same Regulations (7-103.12) and is the principal source of our authority.

The only other reference to appeals in Section VIII is found in Par. 8-520 which records the contractor's right to appeal under the Disputes article.

We are of the opinion that these regulations so identify an appeal with the process of unilateral determination of termination claims as to make the right thereto a part of that process when exercised in the manner provided for in the standard Disputes article. When, therefore, the parties agreed to the unilateral determination of this termination claim in accordance with and pursuant to Section VIII they conferred

¹⁰⁶ ASBCA No. 2346, 25 Sept. 1956, 56-2 B.C.A. ¶ 1071 (1956).

¹⁰⁸ *Id.* at 2603.

¹⁰⁷ *Id.* at 2605.

39 MILITARY LAW REVIEW

the same right of appeal the subcontractor would have had if the Chase purchase order had contained a Disputes article.¹⁰⁸

Therefore, the subcontractor, who did not have a "Disputes" clause in his subcontract but agreed to a direct termination settlement with the Government under the provisions of Section VIII, ASPR, was given the right to bring a direct appeal to the Board on a dispute arising under the settlement. Although here, as in *General Motors*, there was no "Disputes" clause in the subcontract, the Board found privity of contract between the Government and the subcontractor and read into their agreement a "Disputes" clause because of the nature of the claim. There appears to be no more necessity for allowing a right of direct appeal in this case than in *General Motors*, where the direct appeal was not allowed. If the Government and the subcontractor had agreed to settle the termination claim under other than ASPR, Section VIII (which is extremely doubtful, if even permissible), then the Board's holding would have been contrary, based upon the statement in the opinion that the Board's jurisdiction must be found in the agreement between the parties. In *Remler* the Board assumed, for the sake of its opinion, that the Government finally had agreed to give a decision on the subcontractor's claim, but the Board refused to take jurisdiction of the appeal on that basis. Nevertheless, in *Mercury Aircraft* the Board read into the agreement between the subcontractor and the Government a "Disputes" clause in order to take jurisdiction of the appeal. While the Board's decision in *Mercury Aircraft* may be a practical interpretation of the intent of the parties concerned, it does leave unanswered the questions concerning its inconsistencies with *General Motors* and *Remler*.

In 1958, the ASBCA had another direct appeal before it from a subcontractor on a termination settlement in *Portland Mach. Tool Works, Inc.*¹⁰⁹ The subcontract was a fixed-price supply contract under a negotiated prime contract with a "Price Redetermination" clause. The subcontract contained a "Termination" clause, which provided for termination, in whole or in part, by the prime contractor whenever the contracting officer under the prime contract determined it to be in the best interest of the Government. An equitable adjustment was to be made and any disagreement was to be settled in accordance with the ASPR provision concerning disputes. The prime contract was partially

¹⁰⁸ *Id.* at 2606-07.

¹⁰⁹ ASBCA No. 4143, 31 Jan. 1958, 58-1 B.C.A. ¶ 1604 (1958).

CLAIMS OF SUBCONTRACTORS

terminated, and the prime contractor terminated the subcontract in question, along with others. The subcontractor dealt directly with the government contracting officer on his termination claim with the full knowledge of the prime contractor, who took the position it would not pay anything until approved by the Government. The Government audited the subcontractor, and the subcontractor and the contracting officer carried on extensive negotiations which resulted in the settlement of three other subcontractor termination claims. These settlements were effected by means of a supplemental agreement to the prime contract with the amount paid to the prime contractor in settlement to be held in trust for the subcontractor. Claims of lower tier subcontractors were to be settled directly by the Government. The contracting officer made a unilateral determination of the unsettled subcontract under the prime contract "Disputes" clause, and sent his decision to the prime contractor, notifying him that he had a right to appeal. The prime contractor forwarded a copy of this decision to the subcontractor, who appealed the decision directly to the ASBCA. In holding that the subcontractor had a right of direct appeal and that Section VIII, ASPR, controlled the settlement of the subcontract termination claim, the Board stated :

It is not necessary to decide whether [the subcontract termination clause] pertains to disputes between appellant and the prime contractor or disputes between appellant and the Government, as there was a tacit understanding between appellant, the prime contractor and the Government contracting officer that the Government contracting officer would deal directly with appellant, and the prime contractor in effect adopted the contracting officer's decision as its own and passed it on to appellant. We are of the opinion that [the subcontract termination clause], as implemented by the action and understanding of the three parties, gave appellant a right of appeal to this Board from the decision of the contracting officer to be exercised within 30 days after appellant received the decision from the prime contractor. The appeal is timely."¹¹⁰

Portland Mach. goes even further than *Mercury Aircraft*, which was not cited in the opinion, in placing the subcontractor whose termination claim is being personally handled by the contracting officer in direct line with the ASBCA. In *Portland Mach.*, there was not an assignment of the subcontract to the Government or an agreement between the subcontractor and the Government. Only negotiations took place between the contracting officer and the subcontractor. The subcontract settlements

¹¹⁰ *Id.* at 5849.

39 MILITARY LAW REVIEW

that were agreed to were made by way of supplemental agreement with the prime contractor, and the subcontractor had not given up any rights he might have against the prime contractor or assigned such rights to the Government as was done in *Mercury Aircraft*. Inasmuch as the subcontractor and the contracting officer had not agreed to handle the settlement under ASPR, Section VIII, as in *Mercury Aircraft*, the Board had to find a different basis for its decision and could not read a "Disputes" clause into the situation. The Board based its decision upon the conduct of the parties and the "Termination" clause in the subcontract, which was not shown to have been approved by the contracting officer or even relied upon as a basis for the decision. Reading the subcontract "Termination" clause, it is extremely difficult to find any attempt to authorize or contemplate a right of direct appeal by the subcontractor. Additionally, the contracting officer's decision was sent to the prime contractor and was made under the prime contract "Disputes" clause, which leads to the conclusion that the contracting officer never relied upon any subcontract provision. It is difficult to draw any concrete conclusions dealing with the direct settlement of subcontract termination claims after *Mercury Aircraft* and *Portland Mach.* However, it appears that the Board will endeavor to find jurisdiction of a direct appeal by the subcontractor on a subcontract termination settlement dispute when the contracting officer and the subcontractor have been dealing directly with each other with the full knowledge of the prime contractor who acquiesces to the arrangement, and the Board can find a basis for accepting jurisdiction of the direct appeal by the subcontractor in either the agreement, if any, between the subcontractor and the Government or from a provision of the subcontract.

As noted earlier, the request for reconsideration in the *Remler* case,¹¹¹ in part, was based upon the theory of a direct settlement of the subcontractor's termination claim by the Government. In denying the request for reconsideration, the Board, in distinguishing *Mercury Aircraft* and *Portland Mach.*, held as follows:

Mercury Aircraft . . . cited by Appellant, is not controlling because there (as distinguishable from the instant appeal) the Contracting Officer undertook to and did make a direct subcontractor settlement of termination claims pursuant to ASPR Section VIII. . . . That action by the Government (not present in the instant case) in itself gave the subcontractor a right of direct appeal from the administrative settlement (determination) thus made. . . .

¹¹¹ ASBCA No. 5295, 13 Apr. 1960, 60-1 B.C.A. ¶ 2612 (1960).

CLAIMS OF SUBCONTRACTORS

In short, the subject appeal is clearly distinguishable from the *Mercury Aircraft* situation because . . . the instant appeal does not involve direct settlement of subcontractor claims which has its own peculiar rules as more fully enunciated above in the *Mercury Aircraft* case.¹¹²

The Board in *Remler* made it clear that the rules on termination settlements with subcontractors were different from those for other subcontractor claims insofar as a right of direct appeal to the Board was concerned. After *Remler*, the most important consideration appears to be the manner in which the contracting officer handles the termination claim settlement. If he uses the procedures found in ASPR, Section VIII, and a determination is made which is considered a dispute under the standard "Disputes" clause, then the subcontractor will acquire a right of direct appeal to the Board.

The difference between the Government directly settling a Subcontract termination claim with the subcontractor and the Government merely assisting the subcontractor in the settlement of its claim, is illustrated in *American La France*.¹¹³ In this case the subcontract was terminated after the prime contract was partially terminated for the convenience of the Government. The prime contractor and subcontractor tried to negotiate a settlement of the subcontract termination claim but failed. Subsequently, the prime contractor notified the subcontractor that settlement of the subcontract termination claim had been delegated to a contracting officer conveniently located near the office of the subcontractor. Thus, a contracting officer was available for either a direct settlement by the Government with the subcontractor or to assist the subcontractor in settlement of the subcontract termination claim. The delegation was conditioned on immediate release to the Government by the subcontractor of the termination inventory, which was urgently needed by the Government. The subcontractor had refused to deliver the inventory previously unless the claim was settled or the prime contractor delegated settlement authority to the Government. Indicating that either direct settlement or assistance was agreeable, the subcontractor agreed both to the delegation and to ship the inventory. The Government then obtained a limited delegation of authority from the prime contractor "to negotiate a settlement, with the express understanding that the matter was to be returned to [the prime contractor] if negotiations failed."¹¹⁴ The last paragraph of the delegation read:

¹¹² *Id.* at 12,818-19.

¹¹³ ASBCA No. 8497, 23 Jan. 1964, 1964 B.C.A. ¶ 4051.

¹¹⁴ *Id.* at 19,876.

39 MILITARY LAW REVIEW

4. The Government assumes no responsibility for settlement of the amount due to the subcontractor in the event that no agreement is reached by negotiation, nor does the Government hereby assume any obligation to make direct payment to the subcontractor of any amount.”

The Government decided to handle the negotiations with the subcontractor by assisting in the negotiations between the prime contractor and the subcontractor and *not* by directly settling with the subcontractor. The subcontractor did not see the delegation of authority to the Government by the prime contractor and later asserted that it had elected to have a direct settlement with the Government, though its acceptance of the delegation did not so state. During the negotiations between the Government and the subcontractor, the negotiating contracting officer made a statement which appeared to acknowledge the right of the subcontractor to appeal directly a decision by the contracting officer, but this was contrary to the delegation of authority to negotiate. After the subcontractor rejected a final offer by the negotiating contracting officer, the subcontractor demanded a finding and determination from the contracting officer which could be appealed. Instead, the matter was returned to the prime contractor per the delegation, and the subcontractor filed a direct appeal with the Board. The Board found that the subcontractor did not enter into negotiations with the Government in reliance on a right of direct appeal being acquired. In sustaining the Government's motion to dismiss because of lack of jurisdiction, the Board stated :

It is of course clear that subcontractors have no standing before the Board, as a general rule. Essential conditions to our jurisdiction are privity of contract between appellant and Government and a recognition by such contract of a right of appeal.”¹¹⁵

And the Board concluded:

The conclusion seems inescapable that the Government deliberately avoided undertaking an assignment of the subcontract and the direct settlement of appellant's claim, and acted instead under a delegation from the prime contractor. . . .

In view of the long established rule against direct appeals by subcontractors, as reflected in numerous Board decisions as well as in Department of Defense policy (**ASPR** 3-305), the absence of a dispute between the Government and the prime contractor relative to the claim, the considered determination of the contracting officer at the time to avoid an assignment and direct settlement of the subcontract . . . this

¹¹⁵ *Id.* at 19,877.

¹¹⁶ *Id.* at 19,876 (footnote omitted).

CLAIMS OF SUBCONTRACTORS

Board concurs with the Government's position that it is without authority to intervene in the matter.”

In this case there was no written agreement between the subcontractor and the Government as in *Mercury Aircraft*, however, the case is similar to *Portland Mach.* in many respects except for the intent of the prime contractor and the Government, albeit not known to the subcontractor, which definitely showed the parties' intentions in the matter. The Board also discussed the policy against direct subcontractor appeals and revived the idea of the necessity for privity of contract between the subcontractor and the Government, which may signal more stringent requirements in the future before a right of direct appeal by a subcontractor is given cognizance by the Board.¹¹⁷ Therefore, it may now be stated that the subcontractor who asserts a right of direct appeal to the ASBCA based upon the direct settlement of his subcontract termination claim must not only show what transpired between himself and the Government but also the understanding between the Government and the prime contractor. This appears to be a necessary requirement in order to facilitate the settlement of subcontract termination claims through government assistance without opening up the area to direct subcontractor appeals every time the Government attempts to assist the prime contractor and subcontractor in agreeing on a settlement.

A review of the above cases, involving the settlement of subcontractor termination claims, leads to the conclusion that a subcontractor may acquire a right of direct appeal to the Board without having a relevant “Disputes” clause in its subcontract, if the right is intended by the Government and the prime contractor when the government contracting officer negotiates directly with the subcontractor. If the Board accepts jurisdiction of the direct appeal by the subcontractor, the Board will apply the procedures set forth in Section VIII, ASPR.

B. APPEALS BY THE PRIME CONTRACTOR ON BEHALF OF THE SUBCONTRACTOR

The most fertile field for controversy today in the area of subcontractors' claims is whether or not subcontractors should have a right of direct appeal to the ASBCA. As previously seen, subcontractors do acquire a right of direct appeal under certain circumstances. But, the great majority of cases involving subcon-

¹¹⁷ *Id.* at 19,878.

¹¹⁸ *But see* p. 149 *supra*.

39 MILITARY LAW REVIEW

tractors' claims based upon governmental action reach the ASBCA by way of appeals by prime contractors on behalf of their respective subcontractors. In order for the prime contractor to bring an appeal, the claim must be a matter which is covered by the prime contract.¹¹⁹ Although many of the situations which provide claims were once considered breaches of contract, many are now specifically provided for under certain contract clauses that refer disputes thereunder to the "Disputes" clause, which thus authorizes an administrative appeal.¹²⁰ With this in mind, the contract in question must be minutely studied before deciding whether or not the governmental action giving rise to the claim is a breach of contract or covered by a provision of the contract. If the claim is covered by a contract provision, then it must be processed in accordance with the administrative procedure provided in the contract—the "Disputes" clause.¹²¹

1. *Exculpatory Subcontract Provisions.*

In 1954, the ASBCA in *Lease and Leigland*¹²² had before it an appeal by a prime contractor which involved the effect of an exculpatory clause in a subcontract upon a dispute arising under the "Changes" clause of the prime contract. The prime contract was for the construction of various buildings at a military installation and it contained the standard "Changes" and "Disputes" clauses. A decision under the clauses by the contracting officer purported to reduce the prime contract's requirements in the plumbing subcontractor's area of operation. This decision called for a reduction in the prime contract price. The subcontractor, and the prime contractor on behalf of the subcontractor, took the position that there was in fact no decrease in the contract requirements because the contract specifications were ambiguous; therefore, the prime contractor appealed the decision of the contracting officer. Before the Board, the Government raised the issue of the prime contractor's right to appeal in this case because the prime contractor was not liable under the subcontract to the subcontractor for the amount of the reduction, the subcontractor already having refunded the amount of the reduc-

¹¹⁹ ASPR § 7-103.12 (Rev. No. 16, 1 Apr. 1966); ASPR § 7-602.6 (Rev. No. 9, 29 Jan. 1965).

¹²⁰ See ASPR §§ cited note 16 *supra*.

¹²¹ See *United States v. Carlo Bianchi & Co.*, 373 U.S. 709 (1963); *United States v. Blair*, 321 U.S. 730 (1944); *United States v. Callahan Walker Const. Co.*, 317 U.S. 56 (1942).

¹²² "ASBCA Nos. 1973 & 1983, 29 Oct. 1954.

tion to the prime contractor. In upholding the prime contractor's right of appeal, the Board stated:

The Government argues that this appeal must fail if the appellant is not liable to its subcontractor for the acts of the Government upon which this appeal is premised and cites authorities in support of such contention. Such argument needs comment no further than to have it pointed out that no act of the Government performed under the contract giving rise to a claim is involved in this appeal. The real question here is the propriety of the contracting officer's action in withholding from the appellant an amount which may be due to the appellant under the contract as written. The appellant's right of appeal in such instance cannot be seriously questioned. What disposition the appellant cares to make of this amount, if found to have been wrongfully withheld from the appellant cannot possibly be of any concern to the Government. Here, in formulating its overall bid, the appellant used the subcontractor as its agent in computing the sum to be allocated to the plumbing phase of the work covered in the bid and it is the appellant itself and not the subcontractor who by this appeal is seeking full contract price payment. The Government's argument is inappropriate in this instance?"

The Board failed to cite any authority in its decision, but it apparently applied the rationale used by the Supreme Court in *Blair*, while the Government attempted to push the "*Severin* rule." Although this case is not actually an appeal by a prime contractor on behalf of its subcontractor, as the prime contractor was only trying to recover the agreed contract price, the case did give some indication of the way the Board may go when it is faced with the problem in a *Blair* type situation. The Board, however, was wrong when it stated that no act of the Government was involved, as this was a change in the specifications as read by the contracting officer and resulted in an equitable adjustment in favor of the Government. Of course, the claim is usually for an increase in the contract price, but this distinction should not make any difference.

Less than two months after announcing its decision in *Lease and Leigland*, the Board was faced squarely with a *Blair* type situation in *General Installation Co.*¹²⁴ The prime contract in the case called for the installation of a heating unit which was supplied under a subcontract. The heating unit exploded after government personnel tampered with its safety devices, and the contracting officer required the prime contractor to repair the unit, which was done with the subcontractor ultimately bearing the cost of repairs under his guarantee. A timely appeal was taken

¹²³ *Id.* at 16.

¹²⁴ ASBCA No. 2061, 14 Dec. 1954, 6 C.C.F. ¶ 61,612 (1954).

39 MILITARY LAW REVIEW

by the prime contractor from the contracting officer's decision requiring the heater to be repaired. In determining that it had jurisdiction to hear the appeal and that the prime contractor was entitled to compensation under the "Extras" clause¹²⁵ of the prime contract, the Board stated :

Since the Lee Corporation [the subcontractor] has ultimately borne the expense of the repairs to the heater and, after the filing of the appeal by appellant, become in actuality the prosecutor of the appeal, the first question for decision is: Does the Board have jurisdiction to consider the appeal on its merits, there being an absence of privity of contract between the Government and Lee Corporation; and the prime contractor having suffered no financial loss in the matter, should not be heard to complain. . . .

. . . .

While this Board has no jurisdiction over claims for breach of contract, the principle of the Blair and Warren Brothers cases is considered analogous for purposes of disposition by this Board of a claim arising under the contract. The contractual arrangement between the appellant and the Lee Corporation contained no provision comparable to the usual clause disclaiming liability on the part of the prime for damages for acts of the Government. . . . The Board accepts the principle of the Blair and Warren Brothers' cases as the basis for holding that the appeal is properly before it for determination on the merits insofar as the costs of complying with the order of the contracting officer is concerned.¹²⁶

In its decision the Board cites *Warren Bros.* in reference to the lack of an exculpatory clause in the subcontract; therefore, the prime contractor may recover on behalf of his subcontractor. However, the requirement placed on the prime contractor to repair the damaged heater was authorized under the prime contract "Extras" clause, and the prime contractor was entitled to recover whether or not he was liable to the subcontractor or there was an exculpatory clause. The Government was required to pay for the work it received irrespective of who performed it, the prime contractor or the subcontractor. This is what *Blair* stands for, not the absence of an exculpatory clause.

A year after *General Installation Co.*, the Board was given an opportunity to decide the application of the "*Severin* rule" to contract provisions allowing equitable adjustments for delays in *Chas. H. Tompkins Co.*¹²⁷ The prime contract called for the construction of a bleach plant, and all of the work was performed by subcontractors. Each subcontract contained the following language :

¹²⁵ ASPR § 7-103.3 (Rev. No. 10, 1 Apr. 1965).

¹²⁶ General Installation Co., ASBCA No. 2061, 14 Dec. 1954, at 8, 10.

¹²⁷ ASBCA No. 2661, 25 Nov. 1955.

CLAIMS OF SUBCONTRACTORS

The Contractor shall have the right, at any time, to delay or suspend the whole or any part of the work herein contracted to be done without compensation to the Subcontractor, other than extending the time for completing the whole work for a period equal to that of such delay or suspension. No delay, suspension, or obstruction beyond the reasonable control of the Contractor, shall serve to terminate this contract or increase the compensation to be paid the Subcontractor.”

The prime contract contained “Government-Furnished Property” [hereinafter referred to as GFP] and “Suspension of Work” clauses. The ASBCA stated that the clauses provided:

For delay in delivery of Government-furnished property, the former permitted an equitable adjustment in the completion date, or price, or both, in accordance with the procedures provided in the “Changes” article, except for claims for damages or loss of profit. The other pertinent provision allowed a similar adjustment in the contract price to compensate the prime contractor for suspension of the work for the convenience of the Government if the suspension was not due to the contractor’s fault or negligence and if “additional expense or loss” was occasioned thereby to the contractor.¹²⁹

The contracting officer gave additional compensation to the prime contractor for losses and extra expenses of its subcontractors arising out of delays caused by the Government, but the prime contractor appealed from the decision of the contracting officer seeking additional compensation on behalf of the subcontractors. The Government moved, in effect, to dismiss the appeal because the prime contractor was not liable to the subcontractor for government caused delays. The Board granted the motion and returned the case to the contracting officer, directing him to withdraw his decision allowing an equitable adjustment and to allow no compensation at all for the delays. The Board recognized that this appeal involved claims under the contract while *Severin* was a breach of contract action, nevertheless, the Board reasoned that the claims were of the same nature as in *Severin* and were, in fact, claims for damages for what would otherwise be breaches of contract. The Board in its opinion cited *Severin* and said:

It now seems well settled that a prime contractor may not maintain an action for additional expenses or loss to its subcontractors, if the subcontracts . . . contain clauses waiving claims against the prime for such expense or loss. . . .¹³⁰

Thus, the first time that the ASBCA was faced with a situation where the “*Severin* rule” could be applied, it did so. True, as the

¹²⁹ *Id.* at 3.

¹²⁹ *Id.* at 2.

¹³⁰ *Id.* at 3.

39 MILITARY LAW REVIEW

Board points out, this was not a breach of contract action as in *Severin*, but the claims were for delay costs and the Government did not receive any tangible benefit from its acts as in *General Installation* and *Lease & Leigland*. The Board, in the above quote, places too broad a reach on an exculpatory clause, because it is clear from *Blair* that a prime contractor may recover for additional work without regard to an exculpatory clause in the subcontract and any amount recovered may go to a subcontractor or not depending upon the rights between the prime contractor and subcontractor.

The Board also cites in its decision *Blair*, *Warren Bros. Roads*, and *General Installation* for the proposition that the absence of an exculpatory clause will authorize recovery for delay costs by the prime contractor on behalf of the subcontractor. While the citation of *Warren Bros. Roads* is correct, *Blair* and *General Installation* are not, as they did not involve delay costs but extra work. After *Tompkins*, it appeared that the ASBCA would apply the “*Severin* rule” to a claim by a prime contractor on behalf of a subcontractor where the subcontract contained an exculpatory clause and the claim was for additional costs caused by delays of the Government. The *Tompkins* opinion by way of dictum would also have the Board apply the “*Severin* rule” to claims not involving delays if the subcontract contained an exculpatory clause.

In 1960, the ASBCA had occasion to decide a number of appeals on behalf of subcontractors by the prime contractor of the Academic Complex at the United States Air Force Academy in the *Farnsworth & Chambers Co. cases*.¹³¹ The prime contractor appealed twice on behalf of subcontractors for additional compensation, alleging that changes in the prime contract’s specifications ordered by the contracting officer required additional work.¹³² The Government made motions to dismiss the appeals because the prime contractor had no interest in the appeals. The Board denied the motions in both cases. It reasoned in the second case:

As stated in its Motion: “The Government denied that Farnsworth & Chambers Company, Inc., is the real or actual appellant in this case

¹³¹ ASBCA No. 5483, 19 Jan. 1960, 60-1 B.C.A. ¶ 2510 (1960); ASBCA No. 5488, 11 Feb. 1960, 60-1 B.C.A. ¶ 2525 (1960); ASBCA Nos. 5768, 5869, 5870, 5871, 5872, 5966 & 5967, 26 July 1960, 60-2 B.C.A. ¶ 2717 (1960); ASBCA No. 5988, 16 Aug. 1960, 60-2 B.C.A. ¶ 2733 (1960).

¹³² See *Farnsworth & Chambers Co., Inc.*, ASBCA No. 5483, 19 Jan. 1960, 60-1 B.C.A. ¶ 2510 (1960); *Farnsworth & Chambers Co., Inc.*, ASBCA No. 5488, 11 Feb. 1960, 60-1 B.C.A. ¶ 2525 (1960).

CLAIMS OF SUBCONTRACTORS

and states that this is in fact and truth an appeal of . . . a subcontractor of Farnsworth & Chambers Company who has merely borrowed the name of the prime contractor for the purpose of prosecuting this appeal. . . . “Although the subcontractor named by the Government is not privy to the instant contract and has not been paid by appellant for installing the pipes in question, those two facts hardly compel the conclusion that dismissal of the appeal is in order. . . . The magnitude of all of the contract’s requirements necessarily foreshadowed employment of subcontractors during performance and upon the occasion of appeals the use of subcontractor’s personnel and records in presenting evidence before this Board. Moreover, the decision from which this appeal was taken was addressed to appellant; and the notice of appeal which was filed thereafter was signed by appellant. Appellant has not disclaimed any pecuniary interest in the appeal; its subcontract does not relieve appellant of liability to its subcontractor under all circumstances including one whereupon successful appeal appellant is awarded additional compensation pursuant to the *Changes* clause of its prime contract. In view of the foregoing the Government’s Motion is denied. *Nils P. Severin, etc.* . . . Appeals of *Lease and Leigland*. . ?—

In the above two cases, the Board has stated that it will not look behind the appeal by the prime contractor on behalf of its subcontractor as long as the appeal is presented technically by the prime contractor, the prime contractor has not denied any pecuniary interest in the appeal, and the subcontract does not relieve the prime contractor of liability under the circumstances of the appeal. These two cases did not involve damages for delays, but claims for additional compensation under the prime contract and the “*Severin* rule” should not have been applicable under any circumstances, even if there was an exculpatory clause. However, the Board, by concerning itself with the question of an exculpatory clause, may have been showing the direction it will take when the question arises in a situation which does not involve delay damages.

Five months later, the Board was again faced with several appeals by Farnsworth & Chambers Co. on behalf of its subcontractors seeking, among other things, additional compensation on account of being required to perform in accordance with the original construction schedule under the prime contract without being given time extensions for excusable **delays**.¹³⁴ In disposing of the Government’s motion to dismiss on the issue of no juris-

¹³³Farnsworth & Chambers Co., Inc., ASBCA No. 5488, 11 Feb. 1960, 60-1 B.C.A. ¶ 2525 at 12,064 (1960).

¹³⁴See Farnsworth & Chambers Co. Ltd., ASBCA Nos. 5768, 5869, 5870, 5871, 5872, 5966 & 5967, 26 July 1960, 60-2 B.C.A. ¶ 2717 (1960); Farnsworth & Chambers Co., Inc., ASBCA No. 5988, 16 Aug. 1960, 60-2 B.C.A. ¶ 2733 (1960).

39 MILITARY LAW REVIEW

diction to hear the appeal because of an exculpatory subcontract clause, the Board reasoned as follows:

In the appeals here, the Government equates expediting with delay and argues that under the Severin rule . . . the claims are barred because of the following exculpatory clause which appears in the subcontract here under consideration :

“(c) Contractor shall not be liable to Subcontractor for any delay to Subcontractor’s work resulting from the act, negligence or default of the Owner. . . .”

The appellant, however, argues that expediting and delay are opposites, and denies that the clause in question exonerated it from liability for any of the claims in issue. We agree, and see no need to examine the effect of the exculpatory clause.¹³⁵

Most construction contracts contain a clause providing that if the contractor is delayed in the performance of the contract and the delay is excusable, then the contractor is entitled to an extension of time in which to perform the contract.¹³⁶ In an appeal involving the same prime contractor, before these appeals on behalf of the prime contractor’s subcontractors were decided, the ASBCA held that when the work is expedited by a failure to grant additional time to perform because of excusable delay, the contractor is entitled to an equitable adjustment in the contract price for the additional costs incurred.¹³⁷ Expediting the contract is considered an acceleration of the work and a change.¹³⁸ These decisions involving appeals on behalf of subcontractors appear to be necessary extensions of the rule laid down in the original case involving only the prime contractor, as there is no valid reason to deny recovery on behalf of the subcontractor because the subcontract contains an exculpatory clause relieving the prime contractor of liability for delays than there is for any other changes under the contract. The “*Severin* rule” should not apply. If the Government had given an extension of time in which to perform, there would be no doubt that the prime contractor could not have maintained the appeals on behalf of its subcontractors due to the delays because of the exculpatory clauses in the subcontracts under the *Tompkins* rationale and the “*Severin*

¹³⁵ Farnsworth & Chambers Co. Ltd., ASBCA Nos. 5768, 5869, 5870, 5871, 5872, 5966, & 5967, 26 July 1960, 60-2 B.C.A. ¶ 2717 at 13,769 (1960).

¹³⁶ See, e.g., ASPR § 8-709 (Rev. No. 9, 29 Jan. 1965).

¹³⁷ See Farnsworth & Chambers Co., Inc., ASBCA No. 4945, 24 Nov. 1959, 59-2 B.C.A. ¶ 2433 (1959); but see Simmel-Industrie Meccaniche Societa Per Azioni, ASBCA No. 6141, 24 Jan. 1961, 61-1 B.C.A. ¶ 2917 (1961).

¹³⁸ See Farnsworth & Chambers Co., ASBCA No. 4945, 24 Nov. 1959, 59-2 B.C.A. ¶ 2433 (1959).

CLAIMS OF SUBCONTRACTORS

rule.” In these decisions, the Board appears to be narrowing the application of the “*Severin* rule” as much as possible.

In *Morrison-Knudeson Co., Inc.*,¹³⁹ the ASBCA had an appeal on behalf of an excavating subcontractor for additional compensation under the “Changed Conditions” clause¹⁴⁰ of the prime contract. The clause authorized an equitable adjustment in the contract price if the conditions encountered in excavating were different from those shown on the contract drawings and specifications. Before the Board, the Government attempted to have the “*Severin* rule” applied inasmuch as there was no apparent liability by the prime contractor to the subcontractor. Although the Board found that the subcontract did not, in fact, relieve the prime contractor of liability, it held that the “*Severin* rule” should not be applied to a claim for adjustments under the provisions of a prime contract. The Board reasoned as follows:

The contract which is before us on this appeal is the prime contract, and the issue is a claimed monetary adjustment as contemplated by the first portion of the “Changed Conditions” article. In our opinion the so-called “*Severin*” doctrine is inapplicable to adjustments under the “Changed Conditions” article. We know of no instance where a court has applied the “*Severin*” rule to an action by a contractor for relief under a specific provision in the contract. It is true that this Board, in *Chas. H. Tompkins Company* . . . , applied the rule in the case of a contract article promising equitable adjustment in contract price for delays caused by the Government. Perhaps the *Tompkins* decision was influenced by the fact that the “*Severin*” case also involved “delay” claims. However, in *Lease & Leigland* . . . this Board refused to apply the “*Severin*” rule to a case involving a claim for equitable adjustment under the “Changes” article. The *Tompkins* and the *Lease & Leigland* cases are, in fundamental aspects, inconsistent. We do not approve application of the “*Severin*” rule to a claim for adjustment under the provisions of a prime contract as that question is presented on this appeal.”

Although the decision in *Morrison-Knudeson* did not specifically overrule *Tompkins*, it did so by implication. *Morrison-Knudeson* and *Tompkins* are, however, not incompatible. In *Tompkins* the claims were for delay damages, while in *Morrison-Knudeson* the claim was for additional compensation because of changes from the specifications. The prime contractor should be entitled to recover for the extra costs in connection with changed conditions because it is in the nature of a change in the contract specifica-

¹³⁹ ASBCA No. 4929, 15 Aug. 1960, 60-2 B.C.A. ¶ 2799 (1960).

¹⁴⁰ ASPR § 7-602.4 (Rev. No. 9, 29 Jan. 1965).

“*Morrison-Knudeson Co., Inc.*, ASBCA No. 4929, 15 Aug. 1960, 60-2 B.C.A. ¶ 2799 at 14,406-407 (1960).”

39 MILITARY LAW REVIEW

tions. Therefore, the Government should be liable no matter who performed the additional work, prime contractor or subcontractor.

Fifteen days after the decision in *Morrison-Knudeson*, the Board decided *A. DuBois & Sons*,¹⁴² which contained a claim similar to the one in *Tompkins*. *DuBois* concerned a claim for extra costs on account of delays in the delivery of government-furnished property (GFP) under a supply contract. A decision of the contracting officer denying a claim on behalf of the prime contractor and his subcontractor was appealed by the prime contractor. The subcontract contained provisions which relieved the prime contractor from any liability to the subcontractor for failure by the Government to deliver GFP on time, but required the prime contractor to make every effort to obtain from the Government, for the benefit of the subcontractor, additional compensation for increased costs. The Government made a motion to dismiss the appeal based upon the "*Severin* rule," however, the motion was denied. The Board based its decision on several grounds. First, the "*Severin* rule" (construction contracts) was distinguished because it applied to breach of contract actions involving damages for delays not, as here, to a claim for an equitable adjustment under the prime contract. The distinction between construction and supply contracts does not appear to be significant, as both type contracts can be subject to the same type delays in providing the GFP. Thus, *Tompkins* seems finally to have been laid to rest. Second, the Board found that the subcontract exculpatory clause and the provision of the subcontract requiring the prime contractor to present the claims of the subcontractor to the Government, when read in conjunction with each other, only placed a limitation on the liability of the prime contractor to the subcontractor based upon recovery from the Government. The Board in *DuBois* cited at length from *Blair* and *Donovan Constr. Co. v. United States*.¹⁴³ The decision in *Donovan* did involve a similar situation where liability by the prime contractor was conditioned upon recovery from the Government. However, the application of *Blair* to *DuBois* appears to be erroneous as there was an exculpatory clause here, though contingent upon liability to the Government, and the claim was not for extra costs in connection with additional work requirements but for delay costs not resulting in additional work.

A review of the above cases from *Lease & Leigland* to *DuBois*

¹⁴² ASBCA No. 5176, 31 Aug. 1960, 60-2 B.C.A. ¶ 2750 (1960).

¹⁴³ 149 F. Supp. 898, cert. denied, 355 U.S. 826 (1957).

CLAIMS OF SUBCONTRACTORS

shows a very definite trend on the part of the ASBCA. Initially, the Board was very hesitant to apply the "**Severin** rule" except in a very similar case such as *Tompkins* even though the Government kept pushing the "rule." In *Lease & Leigland* and *General Installation*, the Board refused to apply the "**Severin** rule" for extra work required as a result of changes even though one case involved no liability by the prime contractor to the subcontractor. Next, in the *Farnsworth & Chambers* cases, the Board refused to go behind the appeals by the prime contractor and refused to equate delay with expediting. Finally, the Board in *Morrison-Knudeson* and *DuBois* wiped out the "**Severin** rule" applied by *Tompkins* as far as claims for adjustments pursuant to clauses in the prime contract are concerned. Although both cases could have been decided on narrower grounds, the Board saw fit to disavow the "**Severin** rule" where it was concerned, as the jurisdiction of the Board must originate under a contract provision. The exculpatory clause in *DuBois* was conditioned upon the liability of the Government to the prime contractor and, therefore, was not in fact exculpatory, and the Board in *Morrison-Knudeson* found that the subcontract did not relieve the prime contractor of liability to the subcontractor, but the Board went much further in its opinion as stated above.

2. Termination Settlements.

In 1959, the ASBCA decided *Acme Coppersmithing & Mach. Co.*,¹⁴⁴ which held that a prime contractor could appeal a unilateral settlement made by the contracting officer on a termination claim on behalf of its principal subcontractor under the prime contract even where the subcontract authorized the prime contractor to terminate the subcontract without liability. The prime contract was terminated for the convenience of the Government, and the prime contractor terminated his subcontracts. During negotiations on the settlement of the prime contractor's termination claims, two claims were submitted, one on behalf of the prime contractors and all subcontractors except one, and the other on behalf of the principal subcontractor. Negotiations between the prime contractor and the Government extended over several years before the contracting officer unilaterally determined the amounts due under both claims, which decisions the prime contractor appealed. Even after the appeals were dock-

¹⁴⁴ ASBCA Nos. 4473 & 5016, 16 Mar. 1959, 59-1 B.C.A. ¶ 2136 (1959).

39 MILITARY LAW REVIEW

eted, further negotiations were conducted but without success. In holding that the claim of the principal subcontractor was properly before it, the Board reasoned as follows:

Provision 3 of this purchase order [the subcontract] is: "We reserve the right to cancel entirely or to reduce the quantity of material covered by this order." The Termination for Convenience of the Government provision of the prime contract is not included. Nevertheless, we are of the opinion that the parties have indicated by the manner in which they have conducted the settlement negotiations that it was their intention that the subcontractor should be fairly compensated for the work which it has done. While the contract provisions and related Government regulations are not part of the purchase order, we shall, in the absence of any other terms, use them as a guide, insofar as they are pertinent, to determine the amount of compensation which should be paid to the subcontractor. Cf *Portland Machine Tool Works, Inc.* . . .¹⁴⁵

In determining whether or not the claim on behalf of the subcontractor should be governed by the requirements of Section VIII, ASPR, concerning adjustments for profit or loss,¹⁴⁶ the Board stated:

We do not believe that it would be realistic for us to find that the parties intended at the time they entered into this subcontract that a substantial loss should be turned into a profit by termination of the prime contract. At the same time we do not believe that they had in mind the departmental regulation governing the prime contract which would deny the subcontractor recovery of its costs because of the prospective loss. We believe that the subcontractor's costs of performance and settlement must be computed as parts of the costs of the prime contract, subject only to the adjustments applicable to the prime contract, and that the parties intended only that the subcontractor should recover his properly computed costs.¹⁴⁷

The Board in *Acme Coppersmithing* has apparently adopted the "peculiar rules" set forth in *Mercury Aircraft* to an appeal by the prime contractor on a termination claim on behalf of the subcontractor. It has looked to the intent of the parties as the controlling factor and not the actual subcontract provisions. The

¹⁴⁵ *Id.* at 9232.

¹⁴⁶ Subclause (e)(ii)(C) of the "TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (APR. 1966)" clause contained ASPR § 8-701(a) states:

"(c) . . . *Provided, however,* that if it appears that the Contractor would have sustained a loss on the entire contract had it been completed, no profit shall be included or allowed under this subdivision (C) and an appropriate adjustment shall be made reducing the amount of the settlement to reflect the indicated rate loss. . . ."

¹⁴⁷ *Acme Coppersmithing & Mach. Co.*, ASBCA Nos. 4473 & 5016, 16 Mar. 1959, 59-1 B.C.A. ¶ 2136, at 9245 (1959).

CLAIMS OF SUBCONTRACTORS

Board disregarded **Severin** here, which would have appeared to apply at the time the case was decided. Normally, the Government will pay the prime contractor on a termination claim only those subcontract termination costs for which the prime contractor is obligated to **pay**.¹⁴⁸ Also, the provisions of Section VIII, ASPR, have been applied in determining the amount of the claim except those portions dealing with loss contracts. The holding in **Acme Coppersmithing** is still valid today, but with the **Morrison-Knudeson** and **DuBois** cases doing away with the “**Severin** rule,” the case loses some of its importance except in-so-far as loss contracts are concerned.

C. APPEALS BY THE SUBCONTRACTOR IN THE NAME OF THE PRIME CONTRACTOR

Although not involving a claim by a subcontractor **because** of **government action**, a recent case which merits comment is **TRW, Inc.**¹⁴⁹ **TRW** involved a CPFF prime contract and a CPFF subcontract. The subcontractor, Itek Corp., alleged that the prime contractor owed it allowable costs of over \$300,000 under the subcontract, but **TRW** and the Government both denied this. If the subcontract costs were allowable, then **TRW** might be denied recovery from the Government because of a cost limitation clause in the prime contract. The subcontract contained two provisions pertinent to the case:

23. DISPUTES — Except as otherwise provided in this subcontract, any dispute concerning a question of fact arising under this subcontract . . . shall be decided by the Contracting Officer who shall reduce the decision to writing and . . . furnish a copy thereof to the Seller [the subcontractor]. . . . Seller or Buyer [the prime contractor] may appeal by furnishing to the Contracting Officer a written appeal addressed to the Secretary, and the decision of the Secretary or his duly authorized representative for the hearing of such appeal shall . . . be final. . .

. . . .

15. ALLOWABLE COST, FIXED FEE AND PAYMENT —

(h) In the event that the Contracting Officer . . . shall not approve or shall disallow payment to the Buyer, or reimbursement by the Government to the Buyer, or any payments made to the Seller under

¹⁴⁸ ASPR § 8-208.2 (1 Mar. 1963); cf. **Westinghouse Elec. Corp.**, ASBCA No. 1089-9, 30 June 1966, 66-1 B.C.A. ¶ 5687 (1966), where the ASBCA held that the prime contractor had not incurred the costs of a subcontract which exceeded a cost limitation in the subcontract; and therefore the subcontract costs were not allowable under the CPFF prime contract; see ASPR § 1-201.1 (1 Mar. 1963), and ASPR § 15-204(b) (Rev. No. 21, 1 Feb. 1967).

¹⁴⁹ ASBCA No. 11373, 19 Sept. 1966, 66-2 B.C.A. ¶ 5847, **reconsideration denied**, 10 Oct. 1966, 66-2 B.C.A. ¶ 5882 (1966).

39 MILITARY LAW REVIEW

this subcontract, the Seller shall promptly refund to Buyer upon written demand the amount as to which each such failure of approval or disallowance applies. Seller may thereupon treat such failure of approval or disallowance as a dispute concerning a question of fact arising under Buyer's contract with the Government and proceed in Buyer's name as provided for in the clause of said Buyer's contract entitled "Disputes".¹⁵⁰

The subcontract was approved by the government contracting officer on a form which was prepared by the prime contractor but based upon government suggestions which provided :

INDORSEMENT OF APPROVAL: (Original Purchase Orders or Subcontracts)

1. The listed purchase orders, subcontracts and/or change orders under Cost-Plus-A-Fixed-Fee Contract are approved under the provisions of the Prime Contracts. This approval shall not relieve the Prime Contractor from any obligation or responsibility which it may have under the prime contracts and shall be without prejudice to any right or claim of the Government thereunder or under any related purchase orders and sub-contracts, and shall not create any obligations of the Government to the Sub contractors under these subcontracts and purchase order."

After protracted negotiations, Itek demanded by letter that the Government contracting officer resolve the dispute between Itek and TRW. Six months later the contracting officer wrote TRW stating that the Government was not obligated to render a decision on a dispute between Itek and TRW, that there was no dispute between TRW and the Government, and that *the costs claimed by Itek were not allowable*. The contracting officer also stated that the letter was not a decision under the "Disputes" clause. It was not clear whether he meant the prime contract or subcontract "Disputes" clause, but it was probably the subcontract clause. Itek appealed directly to the Board from the contracting officer's letter, basing its appeal on the two provisions of the subcontract quoted above. However, before the Board, Itek shifted its position and relied solely on subcontract provision 15(h) which provided for an indirect appeal by way of the prime contract's "Disputes" clause. Itek also, after having filed the first appeal, appealed in the name of TRW in an attempt to come within the provisions of Article 15(h) of the subcontract and the "Disputes" clause of the prime contract. TRW called the second appeal a nullity as it was a duplication of the first appeal, but TRW agreed that Itek had authority to bring the first appeal by

¹⁵⁰ *Id.* at 27,145.

¹⁵¹ *Id.*

CLAIMS OF SUBCONTRACTORS

reason of Article 15(h) of the subcontract and that it should not be dismissed. The Government argued that the first appeal by Itek should be dismissed because it is not an appeal by TRW, but an appeal by Itek against TRW. The Government took the position that it had no dispute with TRW and that government approval of the subcontract did not obligate the Government to settle disputes between Itek and TRW. Itek and TRW argued that approval of the subcontract by the Government bound the Government to decide the dispute brought by the subcontractor, and that the appeal is now by the prime contractor under the prime contract's "Disputes" clause brought by the subcontractor under the authority of Article 15(h) of the subcontract.

In denying the Government's motion to dismiss because there was no standing by Itek to appeal, the Board based its decision on Article 15(h) of the subcontract and the "Disputes" clause of the prime contract. First, the Board faced the question of whether or not a direct appeal by the subcontractor was authorized. It distinguished the case from *Remler*, where there were tailored disputes provisions, the prime contractor and subcontractor intended the Government to decide disputes, and direct appeal by the subcontractor was not an afterthought. Also, *Richmond Steel* was distinguished because it was not clear in this case that the Government would be responsible for the amounts claimed as it was in *Richmond Steel*. In any event, the Board went on to determine that the basis of the appeal was now under Article 15(h) of the subcontract and the question of a direct appeal by the subcontractor was not before it.

Next, the Board considered the effect of Article 15(h) on the appeal and the appeal as one by Itek in the name of TRW under the prime contract's "Disputes" clause. The Board considered correspondence between Itek and TRW which showed that Article 15(h) of the subcontract was intended to operate as self-executing authority to bring the appeal by Itek in the name of TRW without further action on the part of TRW. The Board also found that TRW had not repudiated this right to Itek to bring an appeal in the name of TRW. According to the Board, the case was similar to *Federal Tel.*, which only stands for the proposition of permitting the subcontractor to pursue the remedy of the prime contractor under the prime contract by reason of authority granted in the subcontract and this was what Itek was seeking to do.

Addressing itself to the question of there being no dispute between the Government and TRW, the Board distinguished this

appeal from several other cases. *American La France* involved an attempt by a subcontractor to appeal without any authorization from the prime contractor. *Dorne & Margolin* involved an attempt to resolve disputes between the prime contractor and subcontractor, not a dispute between the Government and subcontractor as agent for the prime contractor as here and was, therefore, similar to *Remler*. *Main Cornice Works, Inc.*¹⁵² and *Roth, Wadkins & Wise Constr. Co.*¹⁵³ were cases where the appeal was by the prime contractor on behalf of a subcontractor, and the fact that there was no disagreement between the prime contractor and Government was used to support the contract interpretation, but the cases were not concerned with jurisdiction. In the present case, the Board held that Itek had authority to bring the appeal, and reasoned as follows:

In the appeal before us, the agreement as to contractual interpretation may have evidentiary value; we need not decide this now. However, the fact that the Government and TRW agree that the costs are unallowable does not change TRW's technical status as appellant pursuant to the authority it gave Itek to proceed in its name.'

The Board concluded its opinion by noting that there had never been a decision by the contracting officer under the prime contract "Disputes" clause by way of Article 15(h) of the subcontract. Nevertheless, the Board reasoned that it would be useless to dismiss the case for this reason as the contracting officer had already stated that the costs were not allowable and, therefore, accepted the appeal, though under a different clause than the one on which the contracting officer refused to issue a decision. Thus, the Board took jurisdiction over the entitlement of TRW to be paid by the Government for the disputed costs and not whether TRW owed Itek the costs claimed.

Three weeks after its initial decision in *TRW*, the Board clarified its initial opinion in a decision given on a Government motion for reconsideration. At the hearing on its motion, the Government argued that there was no issue as to TRW's entitlement to be paid the costs claimed by Itek as TRW had not paid them to Itek, did not consider them allowable, and had not requested the Government to reimburse them. The Government further argued that in order to raise the issue of TRW's entitlement to be reimbursed, TRW had to request reimbursement *and* have

¹⁵² ASBCA No. 9856, 18 Dec. 1964, 65-1 B.C.A. ¶ 4577 (1964).

¹⁵³ ASBCA No. 8280, 21 Dec. 1962, 1962 B.C.A. ¶ 3611.

¹⁵⁴ *TRW, Inc.*, ASBCA No. 11373, 19 Sept. 1966, 66-2 B.C.A. ¶ 5847 at 27,147 (1966).

CLAIMS OF SUBCONTRACTORS

reimbursed Itek or acknowledged liability to Itek. The Board agreed with the Government's first contention, that to place an appeal before the Board the prime contractor must request reimbursement under the prime contract, but it did not agree that the prime contractor must have also reimbursed or admitted liability to the subcontractor. In denying the Government's motion for reconsideration, the Board reasoned as follows:

The purpose which the prime contract's Disputes clause serves is to resolve disputes for which the Government may ultimately be liable. If the prime contractor thinks he has a claim which may have merit, he is free to make a claim and if it is denied in a contracting officer's decision, he may appeal to the Board. . . . This does not mean that a prime contractor is justified in bringing any claim . . . he must believe at a minimum that there is good ground to support it . . . [But this] does not mean that the claiming party must consider the claim certain; It merely means that the claim is made in good faith and is not frivolous or a sham. . . .

When a subcontractor asserts a claim against the prime contractor for which the Government might ultimately be liable and the prime contractor believes that the claim meets the good ground test set forth above, the situation is no different. The prime contractor may pursue the claim himself directly or he may authorize the subcontractor to make the claim in his name and to appeal any denial thereof in a final contracting officer's decision in accordance with the prime contract's Disputes clause. To do this, the prime contractor need not agree that he will be liable to the subcontractor regardless of the decision. Where the identical questions are in the dispute under the prime contract and subcontract, it is sufficient that the prime contractor acknowledge that he will be liable to the subcontractor if the Government is liable to him. Such a position meets the test in ASPR 15-201 that the costs be "incurred or to be incurred." The fact that on balance the prime contractor thinks the claim unjustified does not destroy the right to appeal. All the prime contractor is doing by proceeding or permitting the subcontractor to proceed in its name is seeking an authoritative determination in the forum that might ultimately have to decide the issue anyway.

In this appeal, TRW, by the use of Article 15(h), has authorized Itek to bring this appeal in its name. Itek has done so and therefore as a technical matter TRW has requested payment of the disputed

In *TRW* the Board took the position that although TRW did not think the costs were allowable under the subcontract, this was not certain, and the appeal was a means of obtaining an authoritative decision on the question. Also, the Board specifically stated that it was going to limit its opinion on the merits to the

¹⁵⁸ *TRW, Inc., ASBCA No. 11373*, 10 Oct. 1966, 66-2 B.C.A. ¶ 5882 at 27,296 (1966) (footnote omitted).

liability of the Government to TRW and might, therefore, have to consider the cost limitation in the prime contract. In *TRW* the Board refrained from deciding the issue of a right of direct appeal by the subcontractor under a subcontract "Disputes" clause; however, it did try to distinguish *Remler*, where no right of direct appeal was obtained, and *Richmond Steel*, where a right of direct appeal was acquired, from the present case and placed *TRW* somewhere in between. Nevertheless, it appears that the Board will be extremely reluctant to find a right of direct appeal in a subcontractor when it is faced squarely with the issue again in a case similar to *Richmond Steel*. The Board, however, did give its endorsement to the use of a subcontract clause which authorized the subcontractor to appeal in the name of the prime contractor under the prime contract's "Disputes" clause. Although the subcontract provision in *TRW* was self-executing and allowed the subcontractor to bring an appeal in the name of the prime contractor without any action on the part of the prime contractor, the Board gave considerable weight to the fact that *TRW* had not, in fact, repudiated the subcontractor's right to bring such an appeal. It would appear then that if the prime contractor withdrew or repudiated the right of the subcontractor to bring an appeal in the name of the prime contractor, the ASBCA would dismiss the appeal. Therefore, as long as the prime contractor lends its name to the appeal, no action by the prime contractor is necessary in relation to the appeal. The action by the Board in recognizing the right of appeal by the subcontractor in the name of the prime contractor in *TRW* (and most likely in similar situations in the future) was expressly provided for in Section 3-903.5(b), ASPR,¹⁵⁶ at the time of the appeal.

IV. CONCLUSIONS

A. PRESENT STATUS OF SUBCONTRACTORS' CLAIMS

A brief resume of the area of subcontractors' claims covered by this article shows that the ASBCA was initially reluctant to apply the "*Severin* rule," but it did so in *Tompkins*, which concerned delay damages. The Board then started to whittle away at the rule by narrowly defining its application in the *Farnsworth & Chambers* cases, where expediting was not equated to delays and where the subcontracts did not relieve the prime contractor of liability for additional costs because of changes. Finally, the

¹⁵⁶ ASPR § 23-203(b) (Rev. No. 20, 1 Dec. 1966) is the current provision.

CLAIMS OF SUBCONTRACTORS

Board discarded the “*Severin* rule,” so far as it may ever have been applicable to an administrative appeal under the provisions of a contract, in the *Morrison-Knudeson* and *DuBois* cases. Also, in *Acme Coppersmithing*, the “*Severin* rule” was not applied to an appeal by the prime contractor on a termination claim settlement in favor of a subcontractor although the subcontract relieved the prime contractor of liability to the subcontractor.

During the time the ASBCA’s evolution on the “*Severin* rule” was taking place, the Court of Claims was undergoing a similar metamorphosis and was restricting the “*Severin* rule” severely. The court refused to apply the “*Severin* rule” in breach of contract cases where the prime contractor was not relieved of liability to the subcontractor.¹⁵⁷ In cases involving claims under contracts which did not contain exculpatory clauses, the prime contractors were permitted to maintain actions on behalf of their subcontractors.¹⁵⁸ In *Blount Bros. Constr. Co. v. United States*,¹⁵⁹ the Court of Claims rejected the application of the “*Severin* rule” where the subcontract contained an exculpatory clause, but the suit was based upon a claim for an equitable adjustment due to extra work and not for delay damages caused by acts of the Government. In a second *Blount Bros.*¹⁶⁰ case involving the same contract as in the first case, the prime contractor brought a suit involving a claim on behalf of its subcontractor for delay damages caused by governmental action. The subcontract contained the following provision :

Contractor [plaintiff] shall not be liable to the Sub-contractor for delay to Sub-contractor’s work by the act, neglect or default of the Owner, * * * or on account of any acts of God, or any other cause, beyond the Contractor’s control ; but Contractor will cooperate with Sub-contractor to enforce any just claim against the Owner or Architect for delay.”

The court found that the prime contract had been amended to provide for adjustments because of government caused delays. In denying the Government’s motion for summary judgment based on the “*Severin* rule,” the court stated:

Defendant [the Government] cites a number of decisions in which a

¹⁵⁷ See *J. L. Simmons Co. v. United States*, 304 F.2d 886 (1962) ; *Barnard-Curtiss Co. v. United States*, 301 F.2d 909 (1962) ; *Donovan Constr. Co. v. United States*, 149 F. Supp. 898, *cert. denied*, 355 U.S. 826 (1957).

¹⁵⁸ See, e.g., *Garod Radio Corp. v. United States*, 307 F.2d 945 (1962) ; *J. W. Bateson Co. v. United States*, 163 F. Supp. 871 (1958).

¹⁵⁹ 346 F.2d 962 (1965).

¹⁶⁰ *Blount Bros. Constr. Co. v. United States*, 348 F.2d 471 (1965).

¹⁶¹ *Id.* at 472 n.1.

39 MILITARY LAW REVIEW

suit for the benefit of a subcontractor was held to be barred because the general contractor had been absolved of liability to the subcontractor. . . . In each of these cases, the prime contractor was attempting to assert an action for breach of contract. According to plaintiff, the above cases are not controlling when the claim is one coming within the terms of the prime contract.

We consider the distinction which plaintiff seeks to draw to be valid in this case. As plaintiff points out, the exculpatory clause was intended to insulate the general contractor from the possibility of being (1) liable to the subcontractor for delay caused by the Government, yet (2) unable to recover from the Government. The need for such a protective clause is clear when the contractor's remedy against the Government is an action for breach of contract. On the other hand, the same necessity does not exist when the contract provides that the Government will compensate the contractor for such delay. Thus, we accept the contention of plaintiff that the exculpatory clause did not affect plaintiff's liability to its subcontractor insofar as *claims* under the prime contract were concerned."

The Court of Claims in the second *Blount Bros.* case did not appear to rest its decision on the fact that the exculpatory subcontract clause required the prime contractor to cooperate with the subcontractor in enforcing claims against the Government, which is similar to the ASBCA's position in *DuBois*. Inasmuch as *Blount Bros.* involved a construction contract, the distinction set forth in *DuBois* between a supply contract and a construction contract and the applicability of the "*Severin* rule" is no longer material. The "*Severin* rule" should not apply in any case before the ASBCA now as the jurisdiction of the Board is limited to claims under the contract. On the other hand, it is difficult to determine if *Blount Bros.* completely did away with the "*Severin* rule" in suits before the Court of Claims. It would seem on the face of the decision in *Blount Bros.* that the "*Severin* rule" may still be applied in pure breach of contract situations.¹⁶³

In looking at the settlement of termination claims in favor of subcontractors, the ASBCA applies rules peculiar to the situation as stated in its opinion denying reconsideration in *Remler*. The Board will recognize the right of direct appeal by the subcontractor in the settlement of the subcontract termination claim where it is the intention of all the parties concerned—Government, prime contractor, and subcontractor. But as seen from *American La France*, the Board will be very reluctant to find such an intent by the parties.

¹⁶² *Id.* at 473-74 (footnote omitted) ; *cf.* Cannon Constr. Co. v. United States, 319 F.2d 173 (1963).

¹⁶³ See Note, *A Plea for Abolition of the Severin Doctrine*, 34 GEO. WASH. L. REV. 746, 753 (1966).

The current status of the ASBCA's feelings about direct subcontractor appeals, not involving the settlement of termination claims, is not too clear. Prior to *TRW*, it appeared that if the subcontract, which was approved by the contracting officer, contained a specifically tailored subcontract "Disputes" clause which authorized the subcontractor to bring a direct appeal and the clause was inserted because of government action and/or the contracting officer took action under the subcontract "Disputes" clause, the subcontractor acquired a right of direct appeal to the Board. In *TRW* the discussion by the Board concerning a right of direct appeal by the subcontractor, although not necessary for its decision, seemed to indicate that the Board would not be disposed to find a right of direct appeal in a subcontractor when next squarely faced with the issue. Furthermore, to approve a Subcontract which contains a right of direct appeal in the subcontractor is now contrary to the provisions of ASPR.¹⁶⁴

Another case which was decided by the Court of Claims prior to the *Blount Bros.* cases and deserves brief comment is *G. L. Christian & Associates v. United States*.¹⁶⁵ In *G. L. Christian* the prime contractor subcontracted the whole prime contract with the full knowledge and approval of the Government, where necessary. The subcontract agreement provided that the prime contractor relinquished all rights in the work, that the subcontractor assumed all rights and obligations of the prime contractor, and that the subcontractor relieved the prime contractor of all obligations and responsibilities under the prime contract and agreed to save the prime contractor harmless from all claims concerning the project. Also, the subcontract agreement authorized the subcontractor to act for the prime contractor in all matters concerning the prime contract and to keep all monies collected. And finally, the subcontractor signed the formal prime contract document for the prime contractor under the power of attorney contained in the subcontract agreement. An action was brought by the subcontractor in the name of the prime contractor for losses suffered by the subcontractor and its subcontractors when the prime contract was terminated by the Government. In holding that the claims were not barred by the "*Severin* rule" the court stated:

With the Government's full knowledge and assent, Centex-Zachry [the subcontractor] became in actual fact the prime contractor; it signed the contract with the Government on behalf of the plaintiff and took over

¹⁶⁴ ASPR § 23-203(a) (Rev. No. 20, 1 Dec. 1966).

¹⁶⁵ 312 F.2d 418, *cert. denied*, 375 U.S. 954 (1963).

39 MILITARY LAW REVIEW

the entire role of prime contractor, including the management of performance in the six months prior to cancellation; the defendant has settled with it a large part of the claims and has paid its subcontractors through it. For the purpose of the "Severin doctrine", the only fair position in this court is to treat Centex-Zachry as the prime contractor, to which the housing contract has been assigned with the defendant's full consent, and to disregard the nominal plaintiff as if it were not

The court went on to hold that the Anti-Assignment Act¹⁶⁷ was for the benefit of the Government and permitted the Government to assent to an assignment where appropriate,¹⁶⁸ which was the case here.

The future application of the decision in *G. L. Christian* is difficult to foretell. The decision could be used by a subcontractor, who is a regular dealer of supplies which are the subject of the prime contract, as a basis for asserting a direct claim against the Government when the prime contractor has relinquished management of that part of the prime contract and the Government has dealt directly with the subcontractor. This could result in several different direct appeals from various subcontractors under a prime contract. However, the application of the decision in *G. L. Christian* to an appeal by a subcontractor to the ASBCA will probably be without effect on the Board, unless the facts are identical and an assignment of the prime contract or a part thereof has been found and was approved by the Government.

A look at the possible consequences of the decision in *TRW* in different contexts from that found in the case is in order. In *TRW* there was a CPFF prime contract and a CPFF subcontract which was approved by the Government. The claim was for alleged allowable costs under the subcontract for which the prime contractor was seeking reimbursement from the Government under the prime contract. The Board did not attempt to limit its opinions in *TRW* to the exact situation before it, but discussed generally the right of a prime contractor to assert a claim under the prime contract's "Disputes" clause or to have the subcontractor assert the claim in the name of the prime contractor.

Many fixed-price prime contracts do not require the approval of the contracting officer before the prime contractor may subcontract.¹⁶⁹ Therefore, the contracting officer may never see

¹⁶⁶ *Id.* at 422.

¹⁶⁷ 41 U.S.C. § 15 (1964).

¹⁶⁸ See *Maffia v. United States*, 163 F. Supp. 859, 862 (1958).

¹⁶⁹ ASPR § 23-200 (Rev. No. 20, 1 Dec. 1966) sets forth the types of subcontracts which need the approval of the contracting officer.

CLAIMS OF SUBCONTRACTORS

the subcontract and pass on its terms. So the question arises: Is the approval of a subcontract by the contracting officer necessary before the provisions become effective in a subcontract clause which authorizes the subcontractor to appeal a dispute concerning governmental action in the name of prime contractors? It would appear not. The right given the subcontractor was given by the prime contractor and should not be contingent upon governmental approval as the subcontractor is only the agent or attorney for the prime contractor under the rationale of the Board in *TRW*.

This being the case, a subcontractor may now—with the approval of its prime contractor, which may be contained in a self-executing provision in the subcontract—appeal *in the name* of the prime contractor any claim which may arise because of governmental action involving the prime contract under the provisions of the prime contract “Disputes” clause. Inasmuch as the “*Severin* rule” has been buried by the ASBCA, there should be no claims under a prime contract on behalf of subcontractors which are based on acts of the Government which the Board should refuse *to hear*, and the ultimate liability of the prime contractor to the subcontractor is immaterial to the right of appeal.

B. SHOULD SUBCONTRACTORS HAVE A RIGHT OF DIRECT APPEAL TO THE ASBCA?

No study of subcontractors’ claims would be complete today without some comment upon the proposition espoused by members of industry and their counsel before the Senate Subcommittee¹⁷⁰ that subcontractors should have a right of direct appeal to the agencies boards of contract appeals for claims based upon governmental action. At the present time the Atomic Energy Commission Board of Contract Appeals is the only regularly constituted federal agency board which permits direct subcontractor appeals as a matter of course.¹⁷¹ The jurisdiction of the Atomic Energy Board is, however, limited to those cases where the subcontract has a “Disputes” clause which authorizes a direct appeal and the subcontract was approved by the government contracting officer or the insertion of the subcontract clause was approved by the contracting officer.¹⁷²

¹⁷⁰ *Hearings on Operation and Effectiveness of Government Boards of Contract Appeals Before a Subcommittee of the Senate Select Committee on Small Business*, 89th Cong., 2d Sess. (1966).

¹⁷¹ 10 C.F.R. § 3.1 (1967).

¹⁷² See *Carpenter Steel Co.*, AECBCA No. 5-65, 17 Mar. 1965, 65-1 B.C.A. ¶ 4796 (1965).

Most people who advocate a right of direct appeal by subcontractors do so for two reasons. First, they state that the Government exercises substantial control over the subcontractor's performance and makes many decisions which directly affect the subcontractor.¹⁷³ Second, these advocates of direct appeal by subcontractors point out that it is sometimes very difficult to obtain the cooperation of the prime contractor to bring an appeal on behalf of the subcontractor or to obtain the permission of the prime contractor for the subcontractor to bring an appeal in the name of the prime contractor.¹⁷⁴ Also, they point out that if the prime contractor has received final settlement under the contract and has released all claims in favor of the Government, then the subcontractor will not be able to assert any claim through the prime contractor as there is no longer any possible dispute between the prime contractor and the Government on which to base a claim on behalf of the subcontractor.¹⁷⁵

The Government exercises control over the subcontractors through the prime contractor by requiring in the prime contract that the prime contractor insert in its subcontracts certain provisions.¹⁷⁶ Most of the control by the Government is in the areas of financial management in the form of audits and costing requirements, inspections of items being produced for use in the prime contract **work**, and congressional and executive areas of interest such as minimum wages and equal employment opportunity.¹⁷⁷ The congressional and executive policies which affect subcontractors are matters beyond the scope of this article and will not be treated herein.¹⁷⁸

Requirements in the area of financial management placed on the prime contractor, such as requesting its subcontractors to submit to certain audits and to furnish certain cost or pricing data, are only good business from the Government's point of

¹⁷³ For additional discussion of some of the types of control that the Government exercises over subcontractors see Penne, *supra* note 27, at 1-2; Note, *A Plea for Abolition of the Severin Doctrine*, *supra* note 163, at 760-63.

¹⁷⁴ See comments of Mr. Gilbert A. Cuneo, partner, Connors, Sellers and Cuneo, Washington, D. C., in *Hearings on Operation and Effectiveness of Government Boards of Contract Appeals*, *supra* note 170, at 95.

¹⁷⁵ *Pearson, Dickerson, Inc. v. United States*, 115 Ct. Cl. 236 (1950) (dictum).

¹⁷⁶ See ASPR §§ cited note 12 *supra*.

¹⁷⁷ *Id.*

¹⁷⁸ See, e.g., ASPR § 7-602.37 (Rev. No. 9, 29 Jan. 1965), for some of the requirements placed on some construction subcontractors in the area of social legislation. For a discussion of this social legislation see Note, *Government Subcontractors Remedies in Rem*, 30 Geo. Wash. Rev. 994, 996 (1962).

CLAIMS OF SUBCONTRACTORS

view. These requirements are placed in cost-reimbursement type contracts where the Government is going to pay for the subcontract costs incurred by the prime contractor, and the Government is entitled to see that the costs are reasonable and proper. Also, these requirements placed on the subcontractor through the prime contractor help avoid later difficulties, as the subcontractor is put on notice as to what is expected of him in the way of verifying costs and what costs are reimbursable by the Government through the prime contractor. In addition, knowing that the Government will audit its price data will make the subcontractor and the prime contractor more cost conscious and will enable the Government to obtain the best possible price, which is only in keeping with Congress' intent in the area of government **procurement**.¹⁷⁹ It is very doubtful that any large manufacturers or commercial concerns would let their prime contractors and their subcontractors perform contracts without a certain amount of control over the costs if ultimately they were going to pay them on a cost reimbursable basis.

The Government also becomes involved in the subcontractor's work through inspections of the parts or other items that the subcontractor is producing for use in the prime contract work. If the subcontractor is located a considerable distance from the prime contractor's plant, it is normal for the Government to inspect the items being produced by the subcontractor at the subcontractor's plant in order to eliminate delays in shipping and **reworking** if the items do not meet the prime contract specifications. The standard "Inspection" clause in the prime contract provides a means **by** which a disagreement between the Government and the prime contractor (and the subcontractor through the prime contractor) on an item for use in the prime contract work may be resolved under the prime contract "Disputes" clause. The "rub comes in" where the prime contractor inserts in the subcontract a provision which makes the determination of the government inspector binding upon the subcontractor. In which case, there is a disagreement between the prime contractor and the subcontractor and the Government is only watching from the sidelines. Therefore, it is the action of the prime contractor which should be the subject of any subcontractor complaint, not that of the Government, as the prime contractor may still test the validity of the inspection by the Government by appealing under the "Disputes" clause of the prime contract or allowing the subcontractor to appeal in the name of the prime contractor.

¹⁷⁹ See, e.g., 10 U.S.C. §§ 2301, 2304, 2305, 2306 (1964).

The problem which disturbs most subcontractors and their representatives is the inability to get the prime contractor to take up the cudgel for them in their claim against the Government. Many reasons are given for this lack of enthusiasm on the part of prime contractors to champion claims of their subcontractors. Some of them are that the prime contractor does not want to admit liability to the subcontractor by pressing the subcontractor's claim, the prime contractor does not want to open his books to the subcontractor who may find evidence to make a claim against the prime contractor, the prime contractor may believe that the claim is without merit and he will not be liable under any circumstances, and the prime contractor does not want to get a reputation for being disputatious with the contracting officer.¹⁸⁰ It can readily be seen that all of the above reasons why the prime contractor fails to take up the fight for his subcontractors are based solely upon personal reasons of the prime contractor, which are uninfluenced by the Government except for the last. The assertion that the prime contractor may desire to "stay on the good side" of the contracting officer by not presenting claims on behalf of his subcontractor is not worthy of consideration, as it is an indirect aspersion on the integrity and fairmindedness of government contracting officers. The Government has given the prime contractor ready means under the prime contract to assert any claims on behalf of subcontractors based upon governmental action that the prime contractor decides to push, but prime contractors are reluctant to do so for their own personal reasons and this is not the fault of the Government. The subcontractor has only himself to blame for entering into a subcontract which does not secure him the right to appeal in the name of the prime contractor any claim based upon acts of the Government after the decision in *TRW*. If the prime contractor fails to allow the subcontractor to assert his claim in the name of the prime contractor or repudiates a self-executing right to appeal in the name of the prime contractor, then the subcontract could provide that certain allegations are admitted by the prime contractor in any judicial action.¹⁸¹

Several reasons are also asserted on behalf of the Government for not allowing a right of direct appeal by subcontractors. These include the proposition that "[t]he Government is entitled to the

¹⁸⁰ See Creyke & Lewis, *Construction Subcontract Claims Procedures*, THE GOVERNMENT CONTRACTOR, BRIEFING PAPERS No. 65-3 at 2-3 (1965); Note, *A Plea for Abolition of the Severin Doctrine*, *supra* note 163, at 758-59.

¹⁸¹ See Creyke & Lewis, *supra* note 180, at 5-6.

CLAIMS OF SUBCONTRACTORS

management services of the prime contractor in adjusting disputes between himself and his subcontractors." ¹⁸² If claims were made directly by the subcontractors, it would be very difficult to administer the prime contract to prevent duplication of claims and payment. Also, direct appeals may involve matters which are solely between the prime contractor and the subcontractor, and information about the claim may not be available to the Government.¹⁸³ The argument that the Government is entitled to the management services of the prime contractor does not really wash, for if the prime contractor decides to appeal on behalf of his subcontractor or let the subcontractor appeal in the former's name, the claim is merely passed along with some additional amount for prime contractor overhead tacked on. Nevertheless, placing the prime contractor between the Government and the subcontractor serves as a buffer and keeps the subcontractor off the contracting officer's back for very minor incidents.

To prevent duplication of claims, the prime contractor would have to be made a party to every direct subcontractor appeal as the prime contractor is required to be under the Atomic Energy Board procedure.¹⁸⁴ If direct subcontractor appeals were allowed, there does not seem to be any quick solution to filtering out a claim which is, in fact, only a dispute between the subcontractor and prime contractor. One method suggested has been to require the subcontractor to set forth a prima facie case in his claim or risk dismissal of the **appeal**.¹⁸⁵

If subcontractors are given a right of direct appeal, the next question to be answered is who should have this right? One suggestion has been to restrict direct appeals by subcontractors to claims involving a certain minimum amount or subcontractors who perform a certain percentage of the work by dollar amount under the prime **contract**.¹⁸⁶ This proposed solution fails to take into consideration the fact that the small subcontractor is the one who needs the right of direct appeal, not the subcontractor with the large claim as he will not hesitate to go to court if the prime contractor does not assist in asserting the former's claim. Also complicating the situation is the question of whether or not

¹⁸² ASPR § 23-203(a) (Rev. No. 20, 1 Dec. 1966).

¹⁸³ See Note, *A Plea for Abolition of the Severin Doctrine*, *supra* note 163, at 764.

¹⁸⁴ See *Carpenter Steel Co.*, AECBCA No. 5-65, 17 Mar. 1965, 65-1 B.C.A. ¶ 4796 (1965).

¹⁸⁵ See Note, *A Plea for Abolition of the Severin Doctrine*, *supra* note 163, at 764.

¹⁸⁶ See *Creyke & Lewis*, *supra* note 180, at 7.

39 MILITARY LAW REVIEW

subcontractors below the first tier should have a right of direct appeal to the ASBCA.

In the final analysis, after the decision in *TRW* and the abolishment of the “*Severin* rule” before the ASBCA, the only major roadblock in the path of the subcontractor obtaining administrative relief on a claim based upon governmental action is the prime contractor. The Government allows the subcontractor to handle his own claims before the Board; all that is asked is that the prime contractor contribute his name to the proceedings. As stated by the ASBCA Chairman, Mr. Spector, during the Senate Subcommittee Hearings¹⁸⁷ in response to a question from Senator Montoya requesting an opinion on whether or not subcontractors should have a right of direct appeal:

I think in all sincerity that is the case today. Just as a matter of good economic sense and pressure, a very substantial number of the appeals that we hear are brought by a prime contractor wholly or partially in the interspret of a subcontractor. You can see it there, a subcontractor sitting in^l the hearing room, and he is often represented by his own counsel, and has control of the proceeding, so far as it relates to him. All we ask, in accordance with ordinary common law, is that they maintain the contractual relationship between the Government and the prime contractor by bringing the appeal in the name of the prime. The prime contractor is, of course, very much interested in doing this, we find, because he usually has an obligation to that effect in his subcontract, to which he and the subcontractor, not the Government, are parties. Furthermore, should he be sued by the subcontractor in a State court, and have a judgment taken against him, and meanwhile have neglected his remedy over against the Government until after final payment, then that remedy no longer exists. The prime contractor would be caught, in effect, between the upper and nether millstones and be responsible to the subcontractor in a situation where he, the prime, no longer had a remedy by which he could make himself whole.

So we find, as a practical matter, subcontractors are in effect asserting claims of the type you describe, through and in the name of the prime on a regular basis.”

Subcontractors, in having their claims based upon acts of the Government receive administrative settlement, are faced with obstacles not placed by the Government, but by the party with whom they are privy—the prime contractor. Also, subcontractors engaged in government procurement should not have greater advantages than those in nongovernmental work. An excerpt from *Tompkins* which although addressed to prime contractors appears to be appropriate here is:

¹⁸⁷ *Hearings on Operation and Effectiveness of Government Boards of Contract Appeals*, *supra* note 170.

¹⁸⁸ *Id.* at 12.

CLAIMS OF SUBCONTRACTORS

If the . . . rule is indeed harsh it may readily be avoided by [sub]contractors undertaking Government work. The argument to this Board that it is harsh would come with greater weight if the harshness appeared in the Government contract and not in the subcontract drawn and put forward by the very party advancing the argument.¹⁸⁰

While it may be harsh and somewhat unrealistic to say, after the decision in *TRW* a subcontractor should not be heard to complain to the Government for relief in extricating himself from the friction arising out of his contract with a prime contractor who is unsympathetic to his problems.

¹⁸⁰ Chas. T. Tompkins Co., ASBCA No. **2661**, 25 Nov. **1955**, at **6**.

DA Pam 27-100-39

By Order of the Secretary of the Army:

HAROLD K. JOHNSON,
General, United States Army,
Chief of Staff.

Official:

KENNETH G. WICKHAM,
Major General, United States Army,
The Adjutant General.

Distribution :

To be distributed in accordance with DA Form **12-4** requirements.

DA PAMPHLET 27-100-39 MILITARY LAW REVIEW-1968